



The Litchfield  
Historical  
Society.

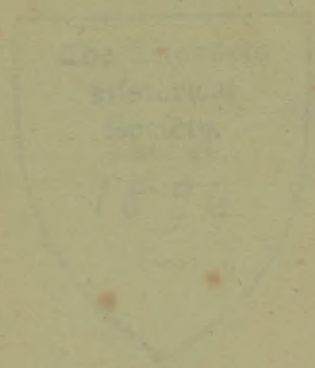
1896



C. Darwin -



1876  
B. D. Williams





of various parts of the  
Coral reefs.

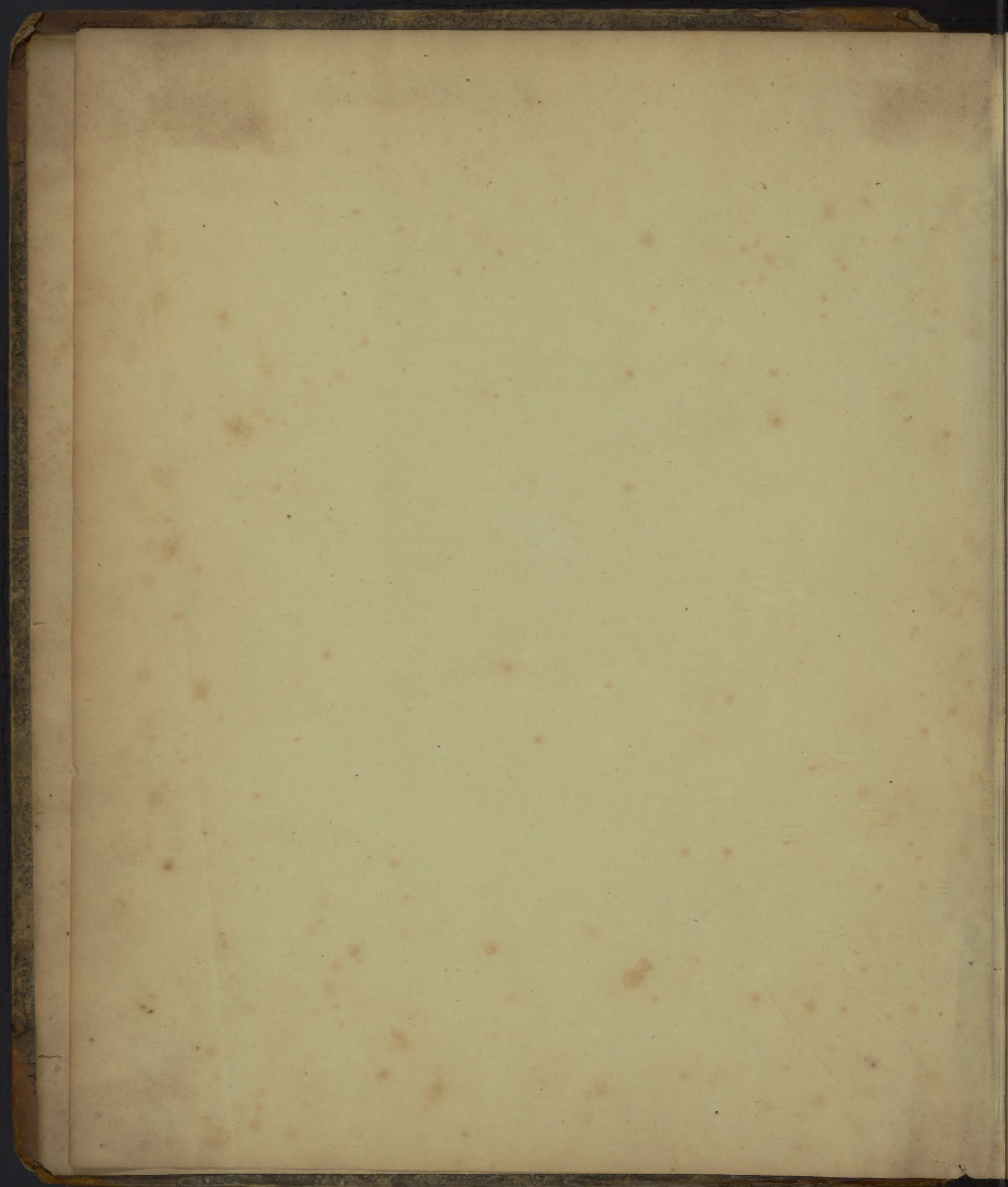
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The first of these is the  
limestone coral reef  
which is the most common  
and is found in all the  
islands of the group.

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The second is the  
coral reef which is  
found in some of the  
islands of the group.  
This is the most  
valuable of the  
reefs and is found  
in the most fertile  
soils of the islands.  
It is the most  
valuable of the  
reefs and is found  
in the most fertile  
soils of the islands.







# Of actions founded on Contracts.

Cop.

Those actions which are founded on contract consist of Assumpsit = Debt = Covenant, Account = and Detinue, and these will be considered in their order. and first -

## Assumpsit.

Promises which lay a foundation for an action are of two kinds - viz - 1<sup>st</sup> express - 2<sup>nd</sup> implied. 1<sup>st</sup> Express promise is one where the terms of the contract raised by it, are agreed upon through-  
-out. or as Blackstone says, where the terms of the agreement are openly uttered and avowed at the time of making. 2 Blak. 447 or 441

This promise may be ~~by~~ parol or in writing, and the form of action is the same in both cases, even if it is required by Stat. of R. and B. to be in writing, you need not declare on it as such, though you may do it. You may give it in evidence under the general issue



2. Implied promises arise in many ways - Black.<sup>14</sup>  
2 Bl. 147 defines them to be such as reason, and instinct  
dictate, and which the law therefore presumes  
that every man undertakes to perform.

Or as it is otherwise expressed - when the terms of  
the contract have not been carried into execu-  
tion, and the subject matter is such, that a  
contract may be made out of it, this is not  
an express but an implied promise.

The implied promise reaches a vast variety of  
cases, and may lay a foundation for an action  
when all ideas of a contract in point of fact -  
are exploded - as in the case of money found  
or when a man turns his wife out of doors.

This law is not founded upon a express or contract  
but upon the principle that it is his duty <sup>to do</sup> as  
the law says he ought to do -

These promises lay the foundation for an action  
of assumpsit which is divided into two kinds  
viz. express and implied -

In treating of this action I shall first consider  
when the express and implied assumpsits are



concurrent, and when only one can be brought. Whenever there is an express contract to pay a certain sum they are concurrent.

Indebtedness always creates a contract, because it enacts a duty - consequently an action on either the express or implied will lie.

And it is the best way to lay both in the same declaration - for when you sue on the express contract alone, if the witness does not remember you fail.

But if on the implied alone although you may give in evidence the express contract to support the implied one, yet you are not bound to do it, but may prove by other testimony the fact of indebtedness to the same amount and recover accordingly.

3 Bl. 184

4 Co. 94

In this case Debt may also be brought. Debt is a sum of money due by contract & agreement, the sum being fixed, and depending on no subsequent valuation to settle it.

This action is generally discontinued as the Debt was permitted to wage his law. To prevent this the action of assumpsit is brought - and the allegation - That he fraudulently and



corruptly interdicted is inserted, for no man can swear himself clear of fraud. —

If a promise be made to do a collateral act and it is not done - the remedy is in damages.

When there is a warranty and a fraud practised at the same time, an action on the warranty for fraud will lie. —

*Indebitatus assumpsit* is concurrent with debt on a quantum valebat, and an express assumpsit will not lie here, because the express terms of the contract are not agreed upon - thus money loaned without when there is no express contract. In these cases both debt and *indebitatus assumpsit* are concurrent.

Implied assumpsit is sometimes concurrent with trespass and trover - as when it goes into B's field and takes his horse (not stealing it) and sells him - here trespass lies for the entry - trover for the conversion - and *indebitatus assumpsit* for money had and received -



When money is taken by violence - trespass  
be it armed and unarmed - lies.

If money be taken by fraud an action lies  
for the fraud or an action of assumpsit.

There are some few cases in which implied  
assumpsit only will lie -

When the consideration happens to fail  
this is the only action - as if I sell land  
to B. supposing it to be his land & I receive  
the money - but happens not to own the  
land - this action only lies - so in the case  
of money found or paid by mistake.

This action generally lies when one has the money  
of another and cannot in good conscience  
retain it.

This is true but it requires some quali-  
fication - When money is in the hands of  
A. which he ought not in good conscience  
to retain, & if he will with the aid of his  
policy, stop in to prevent his money being  
at a gambling table, cannot be recovered.



back on a principle of policy.

2 Bar. 1010 This action of Treble dp. is peculiar to bills in equity - it is extensive - and whatever may be introduced in rebut in Chancery may be introduced here.

Litk. 29 This action lies for money paid by extortion or deceit - formerly it was necessary to go into Chancery. A married man courted and married another woman and took the rents and profits of her lands - and it was held that this action lay to recover it back.

17 Am. 732 Part money and part goods for a grant of a community (communally) is not given by law - A husband to recover the money was only allowed -

Lat 364 When there was a promise to loan from one man to another, and before the loan was obtained, and after the money was paid - a promisor's lay to recover the money.

This action lies to recover money laid out under a void authority - as. A owes B a sum of money & forged a power of attorney - in B's name and employed C to sue and recover it - to prevent



5

costs, from arising it pays the money to D -  
and D. to C - now C's liability to B is not  
gone - he must pay him, but the question  
arises, whether he could recover it out of  
D the innocent attorney - from C he could  
recover, but he is not to be bound. Here  
the court inclined to the opinion that  
D was liable -

1 Fortn. 59

When an agent recovers money for the Principal,  
and pays it over to him. the principal  
having the right you cannot go against  
the agent. But you must go against the  
Principal. But when the authority is void  
you may recover out of him who acts  
under it. Here however the question arises  
What is a void authority? Authorities  
on this subject seem to clash - will next lect.

### Lecture C. 1. 2. 3. 4. 5. 6. 7. 8. 9. 10.

The principle laid down is this - "When the  
authority given is a competent one, that  
authority is not void" 1. 2. 3. 4. 5. 6. 7. 8. 9. 10.

Letters of Administration were granted to A with  
being found, afterwards a will was discovered. The



Admiral's estate in the mean time collected money, and then there was a repeal of the Acts of administration - The question was whether the money could be collected <sup>recovered</sup> out of the administration - held it could - but yet had the administration paid it over it could not have been recovered - because there was no receipt - he certainly is not liable further than Executor in his own wrong.

to pass B's own money and B dies. A begins  
a will and makes himself Executor - sues A  
and recovers money. afterwards the will appears  
to have been a forged one - <sup>and an administrator is</sup> ~~A dies and the ad-~~  
- <sup>appointed -</sup> ~~administrator dies~~, and a question arose whether  
he recover out of C - held not - for C paid under  
a competent authority.

July 1891 This action of indebtedness amounts to the same in any case where a Court of Chancery would rescind the contract as in the case of extortion, undue advantage, opinion &c

Fact was given me a compromise by an Auditor. This was a loss and rather so.



= advantage - the money could not be recovered back - as the note could not be enforced -

It seems to have been a principle in the English law, that this action would not lie to recover money of a felon because all his property is forfeited. This is now done away or waived by an action for converting the property and it lies -

If money is embezzled and paid over to a bona-fide receiver, it cannot be recovered back because it is the circulating medium and it would be dangerous to allow a recovery - not so with any other species of property as one Cow. 197 horse - (But) had the money been paid over on an illegal contract, this action would lie to recover it back.

Indebitatus a promissit will lie to recover money which has been paid on a judgment, which has been reversed. No other action will lie. Attempts have been made to subject the party in trespass as guilty of a wrong - but they have been fruitless. Trespass will not lie for money paid on a judgment reversed by a



B. J. P. 131 Court having competent jurisdiction.  
Comp. 419

Indebitatus aumpsit lies to recover money  
paid on a judgment of a court of competent juris-  
diction on the ground that the Def. ought not  
to keep the money in justice, for a reason that  
the Plff. could not avail himself of at the  
time the judgment was rendered.

How ever the judgment of one court goes to impeach  
the judgment of another, in a collateral way,  
it is erroneous. But where the judgment is not  
attacked, absolutely, and the money is unjustly  
retained judgment makes no difference &  
it may be recovered in aumpsit.

A judgment cannot be attacked in aumpsit.  
If in this case the party could have proved  
his covenant, and the court could have  
taken cognizance of it, then would not  
have supported aumpsit, but would have  
held him to his article in the covenant.

Whenever aumpsit is brought it is  
brought for the mere fulfillment of the  
contract. When an action is brought



in the implied promise, it is on the ground  
of no action at all. it waives the contract  
entirely.

An action of assumpsit lies to recover money 2 Bl. 2. 1073  
paid on an illegal contract, when the law 1. H. B. 65  
does not place both parties in pari delicto Cov. 790  
as money paid to a lottery, insurance may  
be recovered. So where both parties are  
in pari delicto, yet the law was made to Wong  
protect one and not the other. Benton  
vs.  
Smith

The former may recover back the money  
paid in consequence of such illegal agreement.

An assumpsit lies to recover penalties by bye laws Butt. 1. 2. 189  
Incorporation Laws &c. Carth. 92

This action lies also to recover fees of office, and also  
to recover money on an award. C & B agree  
to submit a controversy, and the award is, that  
A is to pay B £ 20. here the action of debt  
will lie, as well as in delictatus assumpsit,  
and if an express agreement is made to abide  
an award, express assumpsit will lie.

The agreement to submit to an award made  
lays a foundation for a promise.

Suppose instead of an award, to abide



the award, it had been a covenant - Can  
you then sue in covenant? It is said by  
some that you must sue on covenant, for  
it is a higher remedy, which takes away the  
lower one - Mr. Reeves thinks however that  
it does not.

On this subject he says the rule is this, where  
a remedy of a lower nature, by any subsequent  
matter between the parties is reduced to a  
remedy of a higher nature, resort is to be  
had to that remedy - as in case of bond for  
book debt.

But when a party enters into a covenant to per-  
form a collateral act, an action on the covenant  
or for non-performance of the contract will lie.  
- The covenant did not grow out of the  
award.

1 R. 4. 7

2 term. 106

So, if A. enters into a bond for £100 if he  
don't build a house, and agrees that he will.

It is true that when there is a contract of an  
higher nature, no recovery can be had in re-  
covey one

1 R. 4. 180

3 term. 12

1 R. 4. 388

2 term. 14

2 term. 14

Money won at play cannot be recovered, if it  
has been paid over to the winner.

This is allowed in 1. 1. 1. to be recovered back.



by Stat. and in England if brought within a certain time.

Affumpsit is brought for labour done by man in the three professions as Surgeon &c. for money loaned and goods.

This is the action upon in fraud committed, but and here you cannot enquire into the items, unless one can put his finger upon any one and say it is a mistake.

If here money has been paid to an agent which ought not to have been paid, and the agent has bona fide paid it over to the Principal, the agent is not liable, but if he is guilty of any fraud, or wrong he is liable, and must look to the Principal for remuneration.

## Lecture (V. B.)

Affumpsit upon sales, either express or implied. If the vendor has no title the vendee must sue on the warranty or on an affumpsit to recover the money. If the vendor wishes to recover the price of the articles, affumpsit is the action. If the vendor wishes to



have agreed and the vendor make a deposit,  
and then finds that the title is defective,  
in this case he may sue the vendor on the  
implied warranty, but the onus probandi  
is on him, and he may bring a summons for the  
deposit and recover that only, but he can-  
not recover any damages.

Where the contract was only in time and bound  
by the earnest, but property is not transferred  
in title bond.

2.11.1. =  
1078. When the property is transferred you can  
sue only on the warranty.

### Sale at Auction

The printed terms are always to govern what-  
ever the auctioneer may say at the time of  
the sale.

If goods after sale are left with the auctioneer,  
they may be set up again and if then sold  
for a less sum than at the first sale the  
first purchaser is bound to make up the  
deficiency.

But where the property is vested in the buyer  
he must stand to his bargain, and recover  
damages for fraud and if there is none an



express or implied warranty.

If the sale is conditional the parties are bound  
as they make the contract.

1<sup>st</sup> Term. 153.

Singular case in Longlop - Weston vs Dewar -

The law don't require in such a case that  
the property be returned before you bring  
the action! 1. Hen B. 17

But a separate contract between the parties  
may make it necessary. -

To vest property it is not necessary that actual  
immediate delivery should be made, if there  
is no impediment to taking it it amounts to  
a delivery. Sometimes the Vendor is obliged to  
deliver, and then if he fails, and damages accrue  
he must bear the loss. No action will lie in  
avoidance as vendor.

If a man sells an article and payment is to be  
made at a certain future day, the bargain is done.

It is now settled that if a man bids at auction  
he may retract before the hammer is knocked  
down. 3<sup>rd</sup> Term. 148

If the vendor after purchase, makes a deposit &  
then refuses to perform his agreement, the goods



are sold again with the vendor being in  
action to recover the deposit. This is not  
settled at law. I therefore it has been deci-  
18 Nov 945 ded that the action would not lie.

An account to sell at auction is a contract  
with all mankind consequently it is unlaw-  
ful to bid unless the goods go at an uncertain  
price. It is a contract with all mankind  
that the highest bidder shall have the  
articles.

It is settled that if the Employer tells the  
Auctioneer not to strike off the goods unless  
6 Sep 395 at a certain price, and the auctioneer does  
sell for less, he is not liable to his employer.

When an auctioneer sells goods he may bring  
17 Jan 9. 91 an action in his own name to recover the pay.  
for he has a special property in them.

### Assumpsit in case of Wagers.

It is a received opinion in Connecticut  
6 Sep 38 that no action lies to recover a wager.

3 Feb 690 There are some kinds of wagers recognized  
by the common law.

To lay a foundation for a wager the bet must

be uncertain - not in point of fact -

5 B. & C. 253.

Thus whether a decree of the court of chancery would be reversed in the House of Lords -

2. Wagers to perform an illegal act, to introduce indecent behaviour, or to introduce innocent testimony, or to spend with the feelings of law. 3. Third persons not concerned - are void

Wagers which militate against the public morality or public policy are void -

The action on a wager is ex hypothesi aumpsit. In a sht. action of aumpsit it is brought to recover rent upon a bare case - and the agreement between the parties, to the effect that is to be given is the rule of damages.

In Connecticut there is a sht. action. The action is aumpsit upon a quantum contract: as against a tenant at will.

Of tortious holding is not a subject of this action.

In Connecticut if a promise be in writing you must declare on it as in writing, contrary to the common law.



## Lecture c. 4<sup>th</sup>

If a contract of any kind whether bond  
note or covenant is joint the writ must  
be brought against all the contracting  
parties. If not it may be pleaded in  
abatement but no other way. If the Def.  
pleads any other way he waives the non-  
joinder.

If the contract is joint and several  
the action may be brought against one or all  
of them, but not against part of them. i.e.  
it must be all joint or all several.

When you sue on such a contract you need  
not state that the obligation was joint.

1. Str. 76

2. - 819

Coro. 833

- 838

It is disputed whether if you sue one and  
insert the names of others, the declaration  
is good.

It is now settled that this mode is good.

It have to be observed that a lower contract  
is often destroyed by a higher one - as a promise  
to pay a bond - but it is said if the promise  
to pay is founded on a new consideration an

11  
action may be brought upon it as in this case <sup>606. 343</sup>  
C. has a bond against B. and calls on him <sup>607. 598</sup>  
for the payment B. says produce the bond <sup>802. 67</sup>  
and I promise to pay it - here an action <sup>1006. 11</sup>  
may be brought upon the promise, because <sup>517</sup>  
there is a new consideration viz. the trouble <sup>317</sup>  
of getting it -

Judge Keen thinks the damages nominal  
and that the amount of the bond could  
not be recovered except on the bond.

C. more voluntary outcry will not uphold an  
action. - (But if the thing be in its nature ac-  
crued not if the person was led into it by the  
other request of the other party, it will be <sup>Sub. N. Pri.</sup>  
left to the jury to determine whether there <sup>123 or 153</sup>  
shall be a recovery -

Upon Principles of mercantile law a recovery  
can be had for a voluntary outcry i.e. C. draws a  
bill of exchange in favour of B upon A and  
the drawee refuses to pay at the time. D. pays  
upon protest for the honour of the drawer,  
C. an action of *indebitatus assumpsit* lies here  
in D. favour against C. yet it is a mere



voluntary contract

As it can in favor of common carrier who  
has goods. Where the consideration of a  
contract is illegal or leads to an illegal act  
there can be no recovery - but when two  
persons jointly engaged in an illegal  
contract, and one party pays the whole sum  
the other party is, or is not obliged to con-  
tribute his portion according to the following  
rule viz. If one undertook to pay the whole  
on the ground, that the other on account of  
it is bound to perform his duty in action with  
him - but if he paid it with the privilege or request  
of the other as a co-debtor -

8 term 418  
— 410

But a knowledge of the law that an illegal  
contract is void of the thing sold shall not  
prevent him from recovering if the sale was a  
bona fide one as if one sells goods to another to  
furnish - but had the sale been illegal, no  
recovery could be had.

4 term 466  
3 term 454

\* Statutes of indemnity to induce illegit acts  
are void, but this requires some qualification -

When a man does an illegal act, even if he  
 can't do it without the law that it  
 was illegal and then says he is sure it is  
 that it was, a promise in kind of indemnity is  
 good - i.e. if a person arrests another and in a  
 void process, and gets a third person to keep  
 him, and gives a bond of indemnity to man  
 from him, that is good. Hut. 5-5

If one promises to pay a certain sum to another  
 for doing what he is bound by law to do, or  
 ought to do - the promise is not binding, and  
 if money has been paid in consequence of such  
 a promise, it may be recovered in assumpsit. 2 Br. 3 Bar  
 e.g. a Sheriff makes a promise and takes 924  
 money to execute a writ - here the money  
 may be recovered.

This action is never supported in law when the  
 claim is unconscionable, any more than in  
 equity. Bow. 793  
 116

Trivial considerations are not foundations for  
 this action. What is trivial cannot be  
 defined. 2 B. 93



When the question of indebtedness involves a question of right, which cannot be tried in assumpsit, the action does not lie as if cattle are taken damage perant, and a common is claimed in the land where the cattle are taken. The owner pays the damage, takes the cattle and then brings assumpsit to get back the money paid. Action will lie.

It is a general rule that, the person to whom the promise is made is the only one to bring the action.

But it is now settled in England as well as here that the person for whose benefit it was made, may bring it as *refragis* *pro* *usu*.

Servants always bind their employers as for their employers give them authority. This is to be determined from the nature of their business.

In these cases the servants themselves are not bound unless they make an express contract or agreement to that effect.

178 here there are a number of partners a C. 20th. 890  
must be found 898

22d. 182

179 not it is pleadable in abatement

2. B. 1. 4. 613

to 675

947

To this rule there are two exceptions. 1<sup>st</sup> Where there has been such a severance by transactions between the parties that there is no ground of claim against them all, but against one only - as when there are three timber merchants and two pay but the third won't - he may be freed and the action restrained. 2<sup>nd</sup> Where one partner dies all the right of property which he held in common goes to his Executor, but the right of suing and being sued, go to the survivor, and if the money cannot be recovered from the Survivor you must then sue the Executor.

A parol agreement before death, may be discharged by parol, without consideration, 2d. 182  
but if after death, there must be consideration or there is no discharge.



It cannot any way be his finger by another  
inconsistent with it - as a Promise to marry  
B in three months, and afterwards in four  
months.

# 14 c. Action of Debt.

Lecture 1<sup>st</sup> March 17<sup>th</sup>. M<sup>r</sup> Gould.

"The legal acceptance of debt is a sum of money  
 under a certain and express contract." &c. Gould. The  
 correctness of this definition on account of the word  
 express although it corresponds with the its general  
 acceptance. For a sum of money due by contract 3 B. Com. 134  
 the word express may in some instances be considered  
 as a debt. Thus it will lie for rent &c. "where it is  
 that action of debt will lie on some contracts on  
 premises implied. This said it will not lie on a  
 parol contract implied out of, or upon a parol  
 bargain or sale."

It is the opinion of Blackstone that debt will lie 3 B. Com. 135  
 on parol contracts if the price is fixed but other-  
 wise if uncertain.

That it will lie not only for sum certain but  
 capable of being made certain. 3 B. Com. 135  
 1 B. Black. 548

The distinction taken by Blackstone is not a good  
 one according to Lord Mansfield and Court of common  
 law. 14 B. Com. 947

pleas - This action has gone into disuse for two reasons 1<sup>st</sup> Not 135  
 viz 1<sup>st</sup> because it is allowed the Def<sup>t</sup> to pay the whole sum claimed and must be recovered accordingly. 3 B. Com. 341.  
 343  
 to the rules of common law. But this rule is now  
 out of use. The Pl<sup>ff</sup> may recover a smaller sum  
 14 B. Com. 947



Apr 2 24. The action on the note. In common law is contrary.  
Chit. 221. The action of debt on a written contract in writing  
is not a breach of law.

This action will not lie against executors  
Nov. 182. Admin. on a contract when it would lie against  
Nov. 200 original parties. The reason for this distinction does  
not now exist. It was that they could not sue.  
Chit. 195- Their law. They are not in such a position as to sue.  
187- The action does not exist in case of the executors.

It has been decided in a latter instance that  
that debt will lie on a Promissory Note. This was  
formerly decided to be law. The current decision  
is against it. Chit. in favour of the decision.

Before the Statute Prom. Notes were not  
Chit. 221. enforceable contracts. Therefore they could not be assigned  
Hargr. 680 as the bases of the action. Hargr. 680 giving it as his  
opinion that debt will not lie on Prom. Notes.  
Chit. 193 According to the Common Law they were only evidence  
of contract.

The decision is that debt will not lie on  
Promissory note, although it is different in context.

When a verbal promise to pay a determinate  
3. Mar. 1886 sum, debt will not always lie.

Nov. 2. Chit. 220 Where one agrees to pay a certain sum for his  
own use, or for services, he is bound to him it will lie.

It is otherwise if he promises to pay for another. Ex. 179  
Spendings without reference to that of receiving by B. 107.  
140. 193

If one promises to pay a debt in consideration  
of a security given up - action of Debt will not lie  
but Debtors will have claim against the original  
debtor - Against the person promising, must be  
a special action on the case.

But when the original liability is indolent  
is upon the person making the promise for the benefit  
of a third person - it is the proper action for him in the  
debtor, and the B. has no claim for whom benefit this L. 179. 842  
person was made not being liable at all to the  
promisee - Thus if C. should take B. to deliver to  
I. 100 lbs goods, and I will for you price, Debt will lie  
against C. in favour of B.

When a similar principle it is said Debt will not lie  
in the drawer of a bill. To exchange against the acceptor L. 179. 45  
will not lie against the Drawer by payee. The  
acceptor becomes liable for another man's debt, he en-  
gages to pay the debt of the Drawer to the Drawee.  
Chattel questions this but without authority to me. L. 179. 21  
So it is his choice -

Another instance is that if the bill is indolent to  
the drawer and also liable to the Drawee - L. 179. 21  
Drawee if he does not pay the bill is in no way liable  
to the drawer - may receive the bill and demand not more L. 179. 24  
350



Robert 200  
2. 14  
Chitty 200

Robert 200  
2. 14  
Chitty 200  
I have seen a man who has been in the name of  
Robert 200 - here the contract is in his name  
but the name is not.

In certain cases where there is no express contract  
or bargain or promise - still with the law on what the law  
is an implied contract - Thus it will be in  
a house, where no specific action is here  
described by the law to the obligation of a contract.  
In fact it is the law to the obligation of a contract.  
and the law is in fact in this case.

~~Robert 200  
2. 14  
Chitty 200  
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Robert 200  
2. 14  
Chitty 200

Robert 200  
2. 14  
Chitty 200

The action is founded on this idea. That every man  
 in common law promises to pay every pecuniary claim  
 made by him upon him by law, and in the manner  
 prescribed. It is more strict in all its parts but not  
 in its consequences, if it civil in form, in return  
 and in writ and remedy in general. There has been  
 no dispute concerning it in Connecticut, but it  
 is clearly civil and not criminal. The slavery  
 are admirable - &c

4 Term. 756  
 2 Term. 203  
 3 Term. 448  
 7 Term. 289  
 1797

Under our law no cause of a criminal nature  
 is appealable from the Court of Com. Pleas to the  
 Superior Court. Debt is appealable under § 70. It  
 is not question whether to Debt, on Pleas of  
 "Not guilty" is good has been made. But  
Butler thinks it is. "Not debt" is the proper plea  
 Not guilty is not a good plea. I should think  
 that in point of form it was not good -

1 Term. 46  
 Part II. 351  
 1800

Letter of March 19th

The action Debt now lies to recover damages  
 as in case of a breach of contract it is not the  
 because the action lies for damages as in case of  
 injuries and wrongs. After damages  
 have been recovered Debt will lie on the

12th 600  
 1801  
 1805



2. Scott 14 on the judgment because the sum is as-  
certained. The P. & A. were to receive \$100. in  
trifling action of debt would be -

Judgment then converts damages into debt.

2. Thayer 923 Debt will be an award of arbitrators. That  
one party has a certain win, be unable set aside  
it is not the nature of a judgment.

1. Bar. 2482 Action of debt will lie when the debt is in  
custody upon the execution, for the taking of the  
body is deemed in law a satisfaction of judgment.  
1. Wm. 537  
C. C. 525 Now then if the Debt has been in custody and has  
been discharged by P. & A. consent, this action  
cannot afterwards be supported -  
7. Co. 420  
9. Co. 129

Now if the Debt is discharged by consent of the  
Jury & the P. & A. with an agreement to pay the judgment  
within a limited time, with this action lie -

Carth. 30. I have opinion concerning the time to bring the  
1. Sid. 351 action on judgment made in Eng. and this Note  
2 or 3 Bar. In Eng. execution cannot issue but within a  
year and a day after judgment. The P. & A. only  
361 and 2. remedy in this case is at law. but by debt or  
judgment. The term is that it is because  
the execution has been satisfied.

The Stat. West. 2d gave the Plff a writ of  
to make the Debt - how cause why execution should  
not - was upon judgment after the time has  
elapsed - This is a judicial writ.

The rule as now received in Eng. is - that after the  
lapse of time, the Plff cannot have execution <sup>bro. 2364</sup>  
without *scire facias*, but it is otherwise when <sup>note 884</sup>  
the execution has been suffered to writ force <sup>91</sup>  
after the time, in which the Plff has a right to <sup>6 mod. 263</sup>  
a writ of *scire facias*. <sup>Case 283-4</sup>  
<sup>3 Bac 262</sup>

There has been a doubt raised in Eng. whether Debt  
would lie within the year and day - There is no re- <sup>2 Bac. 14</sup>  
-cuse for it but I think according to the Eng. <sup>Barth. 30</sup>  
-lish practice the Plff. has a right to the <sup>2. B. Com. 421</sup>  
writ - It is said by the Editor of a late edi-  
tion of Bacon that Debt on judgment is in the  
nature of a punishment for the Debt. not pay-  
ing the proper judgment, and that the Plff. may  
compel payment without the expense of execution.  
I find a case in Kings Bench of Debt brought - <sup>1 Term 637</sup>  
in Easter three months after the Statute term when  
the original judgment was obtained -

The rule of the law here respecting a year and a day  
is not recognized in this State - there is no limitation -



Debt on judgment will not lie in when ex-  
-ecution can be taken out and the full benefit  
obtained. It would be value over time.

When execution cannot be taken out of course  
Debt on judgment will lie. as if a Justice die  
or is removed after judgment and before execution  
the P<sup>l</sup>ff has 5 years to bring his action of debt  
on judgment. If the amount does not exceed  
- 35 - 5000 it may be brought before another justice  
but if greater before the County Court.

There is a rule that a P<sup>l</sup>ff. may have this action  
when through the lapse of time it would be im-  
-possible to effect execution. This rule is indefinite  
as it gives no precise time. There has been one  
case where debt on judgment, was brought after  
ten years and sustained. The P<sup>l</sup>ff. however is  
not confined to this action, he may have Scire facies.

Another rule is where the full benefit of the  
judgment cannot be obtained by an execution  
not being in judgment with the defendant. as if it rec-  
overs judgment against B. B. a third party and  
his property in the hands of C. C. an execu-  
- 421 - tion will not reach this property, and the  
shall have debt on judgment.

18  
The Plff. must prove the specific facts in his declaration.

Again if judgment is rendered in another state  
and debt makes in to this. This action lies. - Kirby 177.

If here judgment has remained long unsatisfied and  
and the Plff. cannot take interest on judgment the  
general opinion is that this action lies to recover  
the interest. Our courts as well as those of England  
allow interest on liquidated debts, but in this  
case they are liquidated by the highest authority.  
But execution follows judgment, and of course an-  
other action must be brought. This principle  
has been decided by the Supreme Ct. 1 Root 176

An erroneous judgment will support debt on  
judgment, a void judgment will not.

The defendant in the former case has power to  
get the judgment reversed by writ of error -  
in the latter the judgment is an absolute nullity -

Lecture & March 19<sup>th</sup> 1810

The action of debt may be supported on a foreign  
judgment -  
Every sovereign State is as to every other State as  
respects this action a foreign State and to every question



Article 4.

Exhibit. The evidence according to the constitution is to be  
Art. 4. held given to the judgment of every State.

There has been much dispute whether the debt  
in an action brought in one State upon judgment  
in another, is at liberty to show the original  
ground of action. The Supreme Court of New York  
have decided that it is at liberty.

I doubt whether this is the meaning of the  
con. Article. It would intend that the re-  
cord proves it well, it would be a idle article.

It is however the general opinion (not  
decided) that the original contract cannot  
be brought into view.

Foreign judgments are not considered as evi-  
dence according to the common law. It is however  
prima facie evidence of a right of demand.

To bring it in effect place the judgments of  
the other State Courts on the same footing.

If a judgment were rendered in Scotland, and  
an action were brought in England, it would not  
be considered as record, and the Debt might  
flow that no cause of action exists.

19

Debt - with a foreign judgment - which are  
considered in the nature of <sup>private</sup> contracts. Brig! 2 Hens 3 410  
The judgment implies a sufficient cause of action but may  
be rebutted.

The Plaintiff need not state in declaring in a  
foreign judgment the original cause of action. Longl.

But it is essential here to notice a distinction  
which is that a foreign judgment is examinable  
and only in such cases, where he who claims the  
benefit of the judgment, applies to the court to  
have it enforced. Which application is made  
by bringing the action. 2 Hens 3 411

But when a foreign judgment is pleaded in bar to an action and  
requiring can never be made into the merits of  
the judgment. 2 Hens 3 412

The reason of this is that when  
a party admits to have a foreign judgment  
enforced, he voluntarily submits the judgment  
which he has obtained to the examination of  
the court. Tom. Reg. 473

But in case of a defence made by  
the judgment this reason does not exist. Skin. 59

The plea of "no such record" is bad, for this does  
not deny the cause of action, and the Plaintiff  
cannot rest on it as a record. The proper plea  
is "nil debet" but it does not vitiate the



May 1. Declaration if the P. is a secret it  
is more for the purpose of

Baron. 174 In these cases on foreign judgment it may be  
175 necessary to prove the foreign laws. These are  
E. mod. 195 proved in the manner of deeds &c. by common  
2 H. B. 410 witnesses. They are writings but not records.  
3 E. 221

There was a case, the case the adoption of our  
constitution, in this state in judgment in  
e. H. B. and sustained. The court said that  
the original cause of action must appear on  
Kirby 126 the face of the declaration. This part of  
the judgment is not correct.  
They treated the judgment left sacred to them  
at common law. They ought to have said  
either that it could not lie, or that the  
original cause of action need not appear.

Long 4 In a case where it is a concurrent action with  
5 that on a foreign judgment. The judgment is  
6 sufficient consideration.

In a case on foreign judgment interest is to be al-  
lowed in an action on judgments.  
There are many cases where debt and indebitum.

are in agreement. It is generally said that debt  
 would lie against a holder in debt as a trustee -  
 would. This is not the case although it may  
 be in a great measure "a concession" as per exam. <sup>May 6</sup> 2 Burr. 1008  
 Indeb. a promp. will lie to recover money paid on a  
 mistake, not with a t.

It is not universally true that indebtedness will  
 lie where debt will lay in case of pecuniary or  
 personal stat. I conclude that in this instance  
 it would not lie, as it has never been brought.  
 In this State there has been one decision that  
 Indeb. a promp. will lie for pecuniary or  
 personal Statute.

The rule that debt will lie where ind. a p.  
 will is in general correct. It is to be understood  
 as true in case of express promises and in cases  
 implied implied from actual contracts. <sup>15</sup> 1. Hen. 3550  
 if one purchases goods with or without specifying  
 price they are in agreement.

If a judgment is obtained by fraud in the  
 first stage on a motion, it is void and this action



cannot be supported in it. The fraud must be  
in the proceedings. If a man obtains judg-  
ment by suppression of perjury, it will not  
be void, but it will if I keep the defendant  
from having opportunity of being heard -

Suits 341. A collection of cases on this subject may be found  
2 B. & C. 845 in Winer's Abridg. 5th Ed. vacat.

1. H. 509 The original process is in some cases void, &  
2. 0. 993 the whole proceedings are in that case void  
L. ed. 47 for they extend on the process.

Some times void on the ground of irregularity.  
Of suits before a magistrate not having  
jurisdiction, who fines him 1000 lbs. it is void.

It has been said that debt will not lie in  
this State for judgment obtained on writ  
of foreign attachment. Judge Reeve rep-  
resents it will not lie. & Mr. Gould inclined to  
different opinion. It is to recover effects out-  
of the hands of garnishee -

### Lecture March 21

7. Dec. 13. Action of debt will lie on a prom. bond or on  
a single bill. indeed this is the proper and the  
the only common law action in such contract.

It is the proper action on our common law bills.  
 The general method has been to bring in the  
 writ action of indebit. Then due bills are  
 substantially single bills. The law is here to  
 give in rule, such a sum at such a time. They  
 are mere acknowledgments of indebtedness. I  
 would always recommend the action of debt on  
 due bills. It is not lawyer like to bring writ. app. Term 14.  
 a though it would be a shorter. The bills are  
 at much deeds as any other. When an in shus  
 ment does not fix the time of payment it is  
 payable at the time of the date.

There has been a case of this kind. The condition of  
 a bond was that the bond was to be void if not paid. 369  
 The court held this to be a condition  
 and considered it in the same light as the  
 condition had been properly interpreted.

If a penal bond is given for the performance of a  
 collateral act, there is sometimes a remedy in  
 Chancery. Rule is that where the object of the  
 bond is to be the performance of col-  
 lateral act, and law gives no remedy except  
 in damages - Chancery will decree a performance  
 of the collateral act.



2 Com. 138  
 3 Com. 432  
 1 East 146  
 1 Com. 303  
 1 East 436  
 2 Com. 106  
 2 Black. 1190  
 3 East 604

There has been a question whether an action on a bond, damaged by a seizure, is an action on the penalty of the bond. It has been decided that it is. That is, recovery on debt cannot avoid the penalty, but as the wages for detention there is a contrariety of opinions on this subject. as per in high -

1 Com. 1189  
 1 Com. 591

Debt will lie on a covenant to recover a sum certain.

1 Com. 1209  
 367  
 2 Com. 388

If the condition of bond is that the obligor be a friend & laborer. This is construed to mean that he shall answer for the person as the account.

2 Com. 174-5  
 2 Com. 156

Where there is a covenant with a penalty. The covenantor has his election to pay for or to satisfy the penalty.

1 Com. 571  
 1 Com. 533  
 2 Com. 192-3  
 2 Com. 523  
 1 Com. 415

There is an exception where it appears that the covenantor should have his election either to fulfill or to pay the penalty. This is determined from the face of the instrument. The covenantor must answer for the penalty. The covenantor cannot be compelled to perform the contract unless he is referred to the payment of the penalty.

his action lies against an officer who has col-  
 lected money in his official capacity for an in-  
 dividual. The collection implies a contract 2 Bac. 114  
 to pay it over. And the collecting of the money 206.  
 transfers the indebtedness or liability to the officer. Moore 886  
 Phila. 220  
 The L. Hen. B. 550

Debt will not lie against the sheriff for what 2 Bac. 114  
 real articles, and not for "selects exemptions".  
 A writ may be issued to compel the sale. - Br. 574

Debt on bond contract the Stat. of limitations 275  
 or a release may be given in evidence under the  
 general issue - No this could not be done in 3 Bac. 579  
 debt upon bond for such evidence would 3 Bac. 586  
 be inconsistent with the plea of "non est factum" Esp. D. 262

The general issue to debt on simple contract is  
 "nil debet" - general issue to debt on bond is 3 Bac. 513.  
 "non est factum" and on judgment - "nil debet"  
 "Record" the on a foreign judgment general  
 issue is nil debet - on such judgment is the  
 same as on simple contract.



# Action of Detinue M. Gordon

1 Inst. 296 Detinue lies to recover a specific chattel. It is in nature of a debt in that it is a sum of money in some respects. The judgment is that specific restitution of the thing be made if it can be found, if not its value together with damages. The debt is a sum of money in the same manner a penalty for non performance.

This action will not lie for a chattel which cannot be identified, as for example the old de for money contained in a bag. Nor this there is a case where the thing must be ascertained but the plaintiff can distinguish & get it. It is different in that he has the specific thing in and pay it to him.

6 Inst. 457 Detinue will lie for a piece of gold if it can be identified as to distinguish it not for 20 shillings. The action lies only when the defendant has the thing lawfully as he delivers or carries. With respect to it as promising in fact this idea is not to be understood. The time is for the specific article as well as the money. Their general nature are for only the thing.

The actions of dett and detinue may be joined in  
 the same declaration, but it is contrary to all  
 principle that det and con should be joined. 1 Jac 11.  
1 Jac 48

An bailment with an express contract to deliver  
 or with an implied contract lies. In case of finding  
 there is an implied contract to deliver to the  
 owner, and it will be sustained.

Detinue will never lie for money, but for it was  
 never to be returned specifically. 1 Jac 11.  
2 Jac 47

The action of trover is concurrent with detinue in  
 all cases, but not "converso". Trover will lie for  
 conversion of a chattel when the original  
 possession was unlawful, not so with detinue.

It is said one reason why detinue would not  
 lie is that originally an unlawful taking could not  
 divest the owner of his property. This is  
 entirely incorrect. The true reason has been  
 stated. It is founded on contract.

This action has long been disused on account  
 of the wager of law, and it is quite rare.



very particular description which was necessary.  
There was a balance of interest existing between  
the two parties and the result was a balance of the  
admission of the usage of law.

L. B. No 45.

From the same entirely superior his action.

# Covenant.

Covenants, contracts and agreements are often used as synonymous words, but they clearly are not so. Contract is a <sup>generic</sup> term and includes all agreements and covenants. Neither is covenant synonymous with agreement - agreement denotes all executory contracts.

A Covenant is a contract written and sealed - therefore it is not a proper expression to say a "Sealed covenant" - tho' tis sometimes so expressed in the books.

This written contract may be by indenture or deed Poll.

1 Bro. C. 244. Fitz. N. B. 846. 1 Mac 526.

But tho' a Covenant is by indenture tis sufficient to support an action ag. the Covenantor if he sealed it, whether the Covenant be sealed or not. Cro. E. 912. Ex. d. 266.

The usual remedy for a breach of covenant is an action at Law for the recovery of damages - However where the damages are reduced to a certainty Debt will lie upon the covenant as well as upon a single bill. So if A covenants with B to pay him £100 on a certain event - debt will lie to recover it. So Debt will lie for a penalty, tho' tis in a covenant, as well as tho' it was in a bond. But where the damages are presumptive, Debt will not lie. Thos. 1039. 1040. 167.



## Covenant.

But where a covenant is to do some specific act - as to make a conveyance &c. The most proper remedy for a breach of such covenant is by a bill in Chan<sup>y</sup> for a specific performance.

It is not meant by this that an action at law will not lie in such case but is a general rule that you cannot obtain relief in Chancery unless you can recover damages at Law. 10 Bonth. 27. 139. 156.

But if a party brings a bill in Chan<sup>y</sup>, and can only show that damages can be recovered, the bill cannot be retained, for a court of law could do this, and further, Chan<sup>y</sup> cannot ascertain damages so for the jury to do this. 1 P. Wms 570. 510. 2 Bro. Chan<sup>y</sup> 341. 10 Bonth. 27. 139.

Even in these latter cases where damages only can be recovered if the relief prayed is consequential or collateral to a ground of relief properly cognizable in Chan<sup>y</sup> the bill will be retained. Hence if matter of fraud is mixed with the damages Equity may retain the bill tho the relief lies in damages only.

Thus if A sues B in Covenant broken at law - A files a bill for an injunction eg. this suit on the ground of fraud - A may now file his cross-bill in Equity for a breach of the covenant, and if no fraud is found Chan<sup>y</sup> will give damages and covenantee will have his relief, by a decree of damages, and in Eng<sup>d</sup> an issue in law may be directed to ascertain the amount of the damages. 2 Bro. Cont. 216

1 Eq. Cases A. 17. 1 Bos 69. 526.

The practice in Council is different from the English, here a court of Equity will enquire itself into the amount of damages, or appoint a committee for that purpose.

Covenants are divided into two kinds - 1<sup>st</sup> Covenant in deed & 2<sup>nd</sup> Covenant in law. A covenant in deed is an Express covenant i.e. is a covenant in fact, being expressly set forth in writing - So if A leases a house to B for one year and B covenants to pay £20 rent, this is express. 4 Co Rep. 468c.

Covenants in law are such as are raised or implied by law. They are then implied covenants. Thus if A demises land to B for a certain time, the law raises a covenant that the lessee shall quietly enjoy it during that time, and also that the lessor has a right to make the lease. 1 Inst 384. Exp D. 266.

Now here is no covenant in form. Covenants in law therefore arise from the nature and form of the agreement.

Covenants are either real or personal.

A covenant real is one by which a person binds himself to pass or spare things real - as lands or tenements. Thus Covenant of quiet in bargain and sale is a covenant real and so is Covenant of warranty. 1 Inst. 139. 2 Co. B. 343. Exp 2294.



## Covenant.

On the other hand a covenant is called personal, when the agreement is annexed to the person, or concerns the personally only. Thus if A covenants to perform work for B - his personal - or if he to pay money, to a carpenter covenant to build a house.

This division is derived from a reference to the object or subject-matter of the Contract or Covenant. 5 Co 16. Fitz N.B. 145.

Covenant in deed is an express covenant, but to make an implied covenant, no precise form of words is necessary, any words importing a concurrence of the parties in the agreement will be sufficient.

Therefore the word covenant nor the word agreement need not be used for it may be by a proviso. As if A leases a house to B reserving a chamber and a passage to it - now this is a covenant on the part of B the lessee that A shall have this licence therefore to a safe rule that any words importing an agreement, being a sealed instrument may amount to a covenant.

1 Barr. 290. 1 Mod. 518. 2 Mod 86. 1 Vent 10.

Again if A leases lands to B and in the deed of lease there are these expressions viz. "reserving so much rent" or "B paying so much rent" and B accepts it, his an express covenant on his part to pay the rent, and if he does not action will lie against him. And it makes no difference whether the deed is poll

in by indurture. 1 Kent 11. See 202. 507. 1 P. St. 1141. 1 Kent 375.

A covenant may be as to something present, past, or future - generally to in future, but not always. So of past, a man may bind himself that he has performed a certain act - Covenant of record is of the present time - and warranty of the future. Plow. Com. 305. a

Covenants in law differ from covenants in deed in this, that covenants in deed are founded upon the words used in the deed. But covenants in law are not implied from the words used, but from the nature of the contract or agreement itself. 4 Co. 50. 5 Do 17. East 93. 2yer 257. Palm. 393

2 mod 92. But all covenants in law may be restrained by an express covenant in the deed. Yelv. 145. Exp. D. 263. 273.

When there is a covenant for quiet enjoyment. This shall not extend to the tortious ejectment or eviction by a stranger for tresp. may have his action against the stranger for this. But if the tresp. be justified by tresp. himself, then tresp. may have action of covenant.

11 C. 114. 46 80.

A recital in a deed of a former agreement will create a covenant, Thus if in deed between A & B is said that "whereas it has been agreed between A and B" or "whereas it has heretofore been agreed that B shall pay a sum of money" &c how this recital creates a covenant, for this recital confirms the original agreement. 3 Res. 465. 1 Leon 122. No technical words are not necessary to create a covenant, yet there must be words which import an agreement.



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to constitute a covenant. Thus where in a lease, lessee covenants to repair during the term provided the lessor will furnish timber. Now this proviso is not a covenant a condition precedent to the lessor's obligation to repair. Now this proviso is not a covenant which will bind the lessor. If however it had been thus viz "that he provided and agreed that lessor furnish timber" This is a covenant and binds the lessor, here is an agreement. 1 Roll A. 518. 2 Com 2560. 8 p 2267.

But by this is not meant that a covenant cannot be created in favor of a proviso, for it may be created in any form, if an intention is manifested to be bound thereby. Thus where a lease was made for 20 years, provided lessor died within 20 years his executor shall have the lease the remaining time. Now this is a covenant. 1 Roll 4. 1 Roll 518. Mon 478. Ray 2709.

If party to a deed executes a bond conditional for performance of covenants contained in the deed - this extends to both covenants in deed and covenants in law - Thus if lease to B by words "dedi et concessi" which imply a two fold covenant - and then makes a bond for performance of these covenants - this bond will extend to both the covenants. 46. 504.

But whenever a stipulation is in the nature of a dispensance, it does not amount to a covenant in law - Thus if covenants to pay B 400 by a certain time on condition, ~~that~~ and provide B, does a certain act before that time - Now this is not a covenant to bind B - it is a mere dispensance. 1 Roll 518. 1 Roll 478. 2 Com 2560.

Covenant.

we have thus far considered how a covenant may be created.

Next, rules as to Construction of Covenants.

In a general rule that covenants are to be construed liberally, according to the true intent of the parties, and not so strictly as if grants executed, for here the construction is strict. How 1410. Inst 454. Bac 389.

Hence it is that often a literal performance of covenants will not secure the covenantor ag. an action, for it may be an evasion of the true intent of the parties. — So where A covenanted to deliver up a horse to B which he held ag. him at a certain day, but before that time he sold the horse and collected it and at the day appointed he delivered it up. — Still he was liable for a breach of covenant, for it was not the intention of the party that it should be so.

See 67. 120 46. Est 270.

So in the other hand where covenantor does all that was intended to be done, he is deemed to have done all, tho in fact he has not done that which the covenant expressed in. There was not a literal performance. 2 Leon 52. I covenanted to leave timber on land, but he cut it down, and then left it. — Still covenant was broken. Tom Day 464. 1 Ann Pl. 276. Skinner 39. Bac 429. 242.

There has arisen upon this point of construction a question viz. whether 50 pounds overplus weight in a collateral article was what was meant by £50 — decided that it meant money!! 120 151.

Another rule is that when the words of the covenant are ambiguous



## Covenant.

They are to be taken most strongly for covenants and most leniently for covenantees. This rule applies to all contracts - those executed as well as executory. Thus where A covenanted to pay B £50 per ann. if he could marry his daughter and no time fixed - here it was held that covenantor should pay it during the life of covenantee. 12 Co 102. 107. 800 39.

A lease with an exception may amount to a covenant, and in some cases it will not, and the distinction is material. Here is where the lease is of a given subject, except a certain part of the subject. This exception is not a covenant - is a lease of a mansion except a certain lot, where there is no covenant on the part of B that he will not encroach on the land.

But on the other hand where the exception is of something or some profit to be derived out of the thing demised, the exception is a covenant. So it leases to B a farm of land except a right to pass over it i.e. right of way - now here is a covenant on part of Lessee that he will not disturb Lessee in going across the land.

So again it leases a house to B excepting a room, and a passage to it - now this right of passage is a covenant, for this is derived out of the thing demised. Co. 6. 64. 104 491. 1200 59. 1000 232.

1000 196. 1200 5238. And there is an important distinction between the construction of express and implied covenants.

Express covenants are enforced more strictly than implied covenants. Thus where one expressly covenanted to perform a voyage by a

Covenant. 3.

certain time - he shall be liable when this covenant was made, pre-  
sented by cause, by him uncontrollable, as by tempest &c. 2 Barn. 187.

3 bar. 188. 8 9 R 239.

But suppose he had given a penal bond, conditioned that he will go the  
voyage at a certain time, and he should be prevented by inevitable  
casualty, he would not be liable to the penalty, for there was no ex-  
press agreement.

The maxim, that no person shall be liable for a loss occasioned  
by the act of God applies only, in those cases when the law makes the con-  
tract, for it does not apply to an express contract.

If the covenants absolutely to pay rent for a house during a certain  
time and the house is destroyed by fire, still the tenant must pay rent, during  
the whole time for which the lease was made. 2 Stra 763. 12 Mod 1477.

12 R 319. 708. 12 Mod 366.

But in case of implied covenants, inevitable accident will excuse  
the covenantor. So tenant for life or years impliedly covenants that he  
will not commit waste, now if losses should be occasioned by the act  
of God, or inevitable accident, as by tempest - he will be excused.

Now in express covenants is the intention of the parties that the cov-  
enantor shall become insurer of all those covenants. But is otherwise in  
implied covenants. 12 Mod 366. 10 Mod 239.

General rule is that a performance of an express covenant is not  
discharged by any collateral matter. So agreeing to pay rent during  
a certain time for a house, and the house is burned before the time



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expires. But to this rule there are some exceptions.

1<sup>st</sup> If one covenants to do a thing which at the time of making the covenant was lawful to be done, but which by a subsequent Stat is made unlawful, the covenantor is discharged, and the covenant is annulled. If A covenants to export from the U States to B in Holland a quantity of salt petre which is afterwards forbidden to be exported by Stat. the covenant is annulled. Black 178.

As to this rule a question has been suggested viz. whether under the constitution of the U States this rule can exist, for that says the obligation of a contract shall be impaired. But I conceive saying that the constitution does not affect this rule of com. law, for it does not operate immediately on the contract or rule of general policy not relating in its terms to any contract which may have been made, does not impair the obligation of a contract.

Another exception. If one covenants <sup>not</sup> to do a thing which a subsequent Stat makes it his duty to do, the covenant is annulled, and the covenantor discharged. Thus if A should enter into a contract with B to serve him 10 years, and not to leave his service during that time, and a subsequent Stat should require all young men to go into the service of their country - here the covenant would be annulled, and the covenantor discharged.

Covenanting to do an unlawful act, and covenanting to do an impossible act are in judgment of law the same thing. Black 178.

But if one covenant not to do an unlawful act, a subsequent act making the act lawful, does not annul the covenant. *Walt. 148.*

General rule that covenants are confined in operation to the subject matter of that which is in being at the time of executing the covenant.

Suppose lease covenants to pay all the taxes of demised premises - now this extends only to such taxes, or to taxes of such a kind as are in being at the execution of the covenant, and not to those of a different kind that may be created afterwards. So if there is only a land tax at time of executing the covenant, and afterwards a tax is created on malt - lessee is not bound to pay this last tax.

*1 Dec 68. 1 Vent 228. Sta 1191. 3 JR 377.*

A covenant contrary to law and good policy is void, and so of all contracts.

*4 Burr 2225. Corp. 341. 729. 3 JR. 17. 10 Mod 6. 164. 176.*

As to the rule that a performance of an express covenant is not discharged by any collateral matter.

It has been made a question where a lessee has covenanted absolutely to pay rent for a certain time, and the house is destroyed before the term is out, whether the lessee can be relieved by a court of Chancery. *1 Chan? Cases 58. 1 Ambler 617.* This question is not settled by authority.

*1 Ambler 66. 306.* Southlake supposes that equity cannot give relief & says Mr. J. is of this opinion is the correct one. It is agreed on all hands that it was the original intention of the parties to pay rent at all events - and if it was, a court of Chancery cannot relieve against it.



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Chancery must give the same construction to it, as a court of law give.

If one leases a personal chattel, and covenants that lessee shall have the use of it - during the term, and within that time it becomes useless by want of repair. now is covenant broken? - tis not the only of the lessee to make repairs, but of the lessor, therefore the covenant is not broken. 1 Bro. 586. want. 26. 44. 1aid 429. 1 want 321.

an assignment of a chose in action if tis by deed, amounts to a covenant by the assignor that the assignee shall have the benefit of the obligation. If then the assignor receive the money or releases the obligor he is liable on this covenant to assignee. Lo Ray? 683  
1d 125. 2d 126. 3d 127. 4th 128. 5th 129. 6th 130. 7th 131.

As this is not meant that choses are negotiable at law, for they are not, but the covenant in this case binds the covenantor. In court he must sue the covenantor for fraud, for receiving the money, or giving a release. In law? tis customary to sue him on the covenant. and if the assignor is a bankrupt, assignee may go against the obligor for receiving the release in Chancery. But in common law he bring action on the case ag the obligor for fraud in receiving the release.

An assignment of a chose in action need not be by deed, nor in writing for in equity or fraud an assignment will be perfected. This is not a covenant but a sale. 42d. 640.

a covenant by a creditor not to sue his debtor within a

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certain time is no bar to an action brought within that time, but if he does sue within the time he is liable on the covenant. Co. L. 2. 2d. 44.

29th B. 10. Art. 10. 1st 473. 16th 238.

But if such a covenant makes a part of the instrument made upon, as if it is inserted on back of the instrument it prevents a right of action till the time expires. But still is not in nature of a bar. The true ground is that the covenant is part or parcel of the instrument, and as it must then be taken into view in the construction of the instrument it is the same as if it were incorporated in the body of the instrument.

8 J. R. 483. 6 D. 637. 757. 12th 152.

But on the other hand a covenant by a creditor never to sue his debtor is a perpetual bar, it operates as a release and may be pleaded as such. 8 J. R. 172. 2d. 352. 2 B. 1st 95. 26th 440.

The object of this rule is to prevent a multiplicity of suits which would ultimately produce the same effect. Co. L. 352. 8 J. R. 170.

A covenant by any person not to sue a legal claim against another that he will not prosecute the claim at a court of particular jurisdiction which has cognizance of the claim, is void. But a covenant not to sue in a foreign country is good bar to a suit in a foreign country, this however is only a local release - it is not a total one. 2 H. B. 603

A covenant not to sue at all one of two joint and several obligors, is no bar as to the other. 8 J. R. 168. 2d. 447. 690. 11th 254. 12th 44. 10th 72. But suppose the obligation is a joint one and there is a covenant not to sue one of them.



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If one grants to a debtor that he shall not be sued before such a day, and if he is he may show this instrument as an acquittal - This is a conditional release. This is different from a covenant, for tis in nature of defence or a conditional release. Cart. 64. 210. Holt. 619. 1 Robt 939. 1 How 45. 330. 350.

There are certain covenants used in conveyances & common assurances which deserve more particular notice.

In all deeds of conveyance except quit claims there are two covenants - 1<sup>st</sup> that the grantor has a title or right to make conveyance. If the conveyance is a freehold tis a covenant of seisin, if tis less than freehold, tis a covenant that grantor has title.

2<sup>nd</sup> Covenant is here called covenant of warranty and in England a covenant of quiet enjoyment. Now tho they may not be expressed, still they are implied from the words used & be rep<sup>d</sup>. 1 Robt 519. 320. 1 to 50. 2 to 392. In a quit claim deed these covenants are not contained.

In a covenant of seisin grantee may sue before eviction, indeed he may sue as soon as the deed is delivered, for if grantor was not well seized tis broke the moment the deed is delivered.

But on covenant of warranty grantee cannot sue till he has been evicted. This covenant cannot be broken till he has lost his possession. Co 9. 369. 170. 9 to 60. Esp 2299. 301. Co 8. 917.

In an action on covenant of seisin tis sufficient to state that

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Grantor was not seized so not necessary to state who was seized ~~was~~  
formerly. 607 389. 9 to 60. 607 170. 2 Root 14 and 140.

If the grantee has alleged that grantor was not seized his in-  
cumbent on grantor to show that he was seized. *Autho: supra.*

A covenant of seisin is broken by an existing incumbrance on land  
unless that incumbrance is excepted - he should specially except it.

3 East 491. *Landrod vs Wapburn* N.Y. New York Sup. Court.

Grantor in case of covenant of warranty must aver seisin,  
and that the eviction was under claim of title, and also that the  
eviction was under good and elder title. This latter is made indispensable.

4 to 80. 1 m. 297. 607 9. 385. 43 R 617. 14 W. 3. 6. 36. 277. 2 Sav. 177.

It has been decided however that when it appears on the face of  
the declaration that the eviction of Pff was under elder title - his good  
in there is no formal declaration of it. 43 R 617. 8 W. 278. 2 Lev. 32.

But is not necessary to state what that elder title was, or in what  
manner he came by it, or under what title the evictor claimed.

2 Lev. 32. 4 J. R. 546. 2 Sav. 177.

Covenant of warranty does not extend to the tortious acts of another  
therefore it is necessary to state that the eviction was under a claim  
of title by the party evicting. *Max 400. 43 R 619. Holt 341. 30 R 584.*

It is sufficient for Pff to allege that he was evicted by suit or  
process of law, for there may have been collusion between the parties.

see 8. 917.

But one may expressly covenant against the tortious



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acts of third persons if he pleases, and in such case there is no need of putting condition." Exp. 2. 273.

But the a general covenant of warranty does not extend to the tortious eviction of a stranger, yet a covenant of warranty against the acts of particular persons extends even to tortious eviction committed by them. Holt 75. 1 Roll 431. Cro 2. 12. Pitt 400.

But this covenant does extend to the tortious acts of the grantor himself, provided he does it under claim of title, or by such an act as appears to be an assertion of right. 19 R 671. This rule holds to ten cases where the covenant extends to all lawful eviction. Exp. 2. 302. 273.

Rule is if grantor evicts his grantee under claim of title he will be liable. This rule extends to all persons included in the covenant as Exec<sup>t</sup> of Gen<sup>l</sup> and heirs. 1 Roll R 21. Exp. 2. 302. 273. 257.

It has been said that a covenant by an Exec<sup>t</sup> as such as to quiet enjoyment, tho' his interests against all persons whatever, yet his by construction restrained to himself and all persons claiming under him. 1 Wm 3. 314. 11 Rep. Touch. Stone. 163.

I do not see how this Exec<sup>t</sup> can be taken out of the com rule. I should think it would extend to any person who tortiously evicts the grantee. In Consequence there is an established difference between the rule of Damages in covenant of seisin, and that of warranty, and as to the latter our rule is different from the Eng<sup>l</sup>.

In Eng<sup>l</sup> upon covenant of seisin the Plff recovers the consideration,

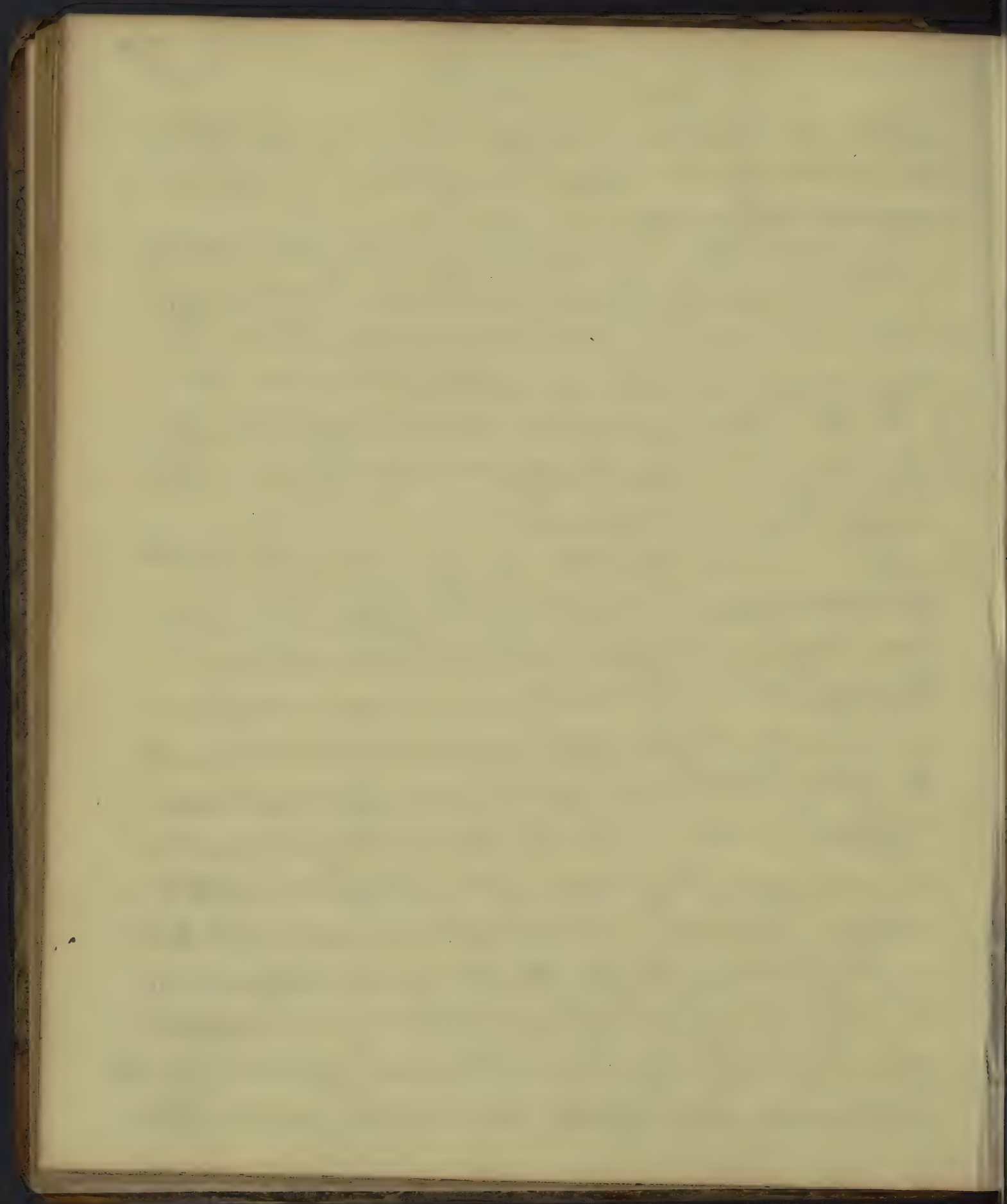
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and the interest. As to the rule of damages in case of warranty, I find no rule as adopted in England. I suppose however it would be the actual damage which Off sustains.

In Connect. the Off on a covenant of seisin recovers his consideration and interest, the same as in England. But on his covenant of warranty he recovers the value of the land at the time of the eviction and the damages which he has sustained in consequence of the eviction. Hence in this State it has been deemed proper to make a difference between rule of damages in case of covenant of seisin and that of covenant of warranty. Widg. 3. 2 Root 416. 294.

There is another essential difference between the incidents of the two different kinds of covenants as it respects the assignees. On a covenant of seisin the assignee of the grantee can maintain an action against the first grantor - Reason is Covenant of seisin is broken at the moment of the execution, when grantor had no title, therefore that instant the right of action accrues to grantee and a right of action cannot be assigned, he now has a mere chose in action - this right of action is a personal right of the grantee and cannot be assigned. Belk. 158 Esch. 298. But on covenant of warranty rule is otherwise - for this covenant is ever to defend the title, (after a covenant of warranty has been broken it can't be assigned.) But if the grantee assigns & assignee is ousted he may recover on the warranty against the grantor for this eviction. Belk. 158. Esch. 298. When action of ejectment is a dispute





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is brought against grantee his usual in covenant to notify grantor of the pendency of the suit, that he may come and defend, and if he perchance is called couching in the grantor. 13th 101.365. Bao.

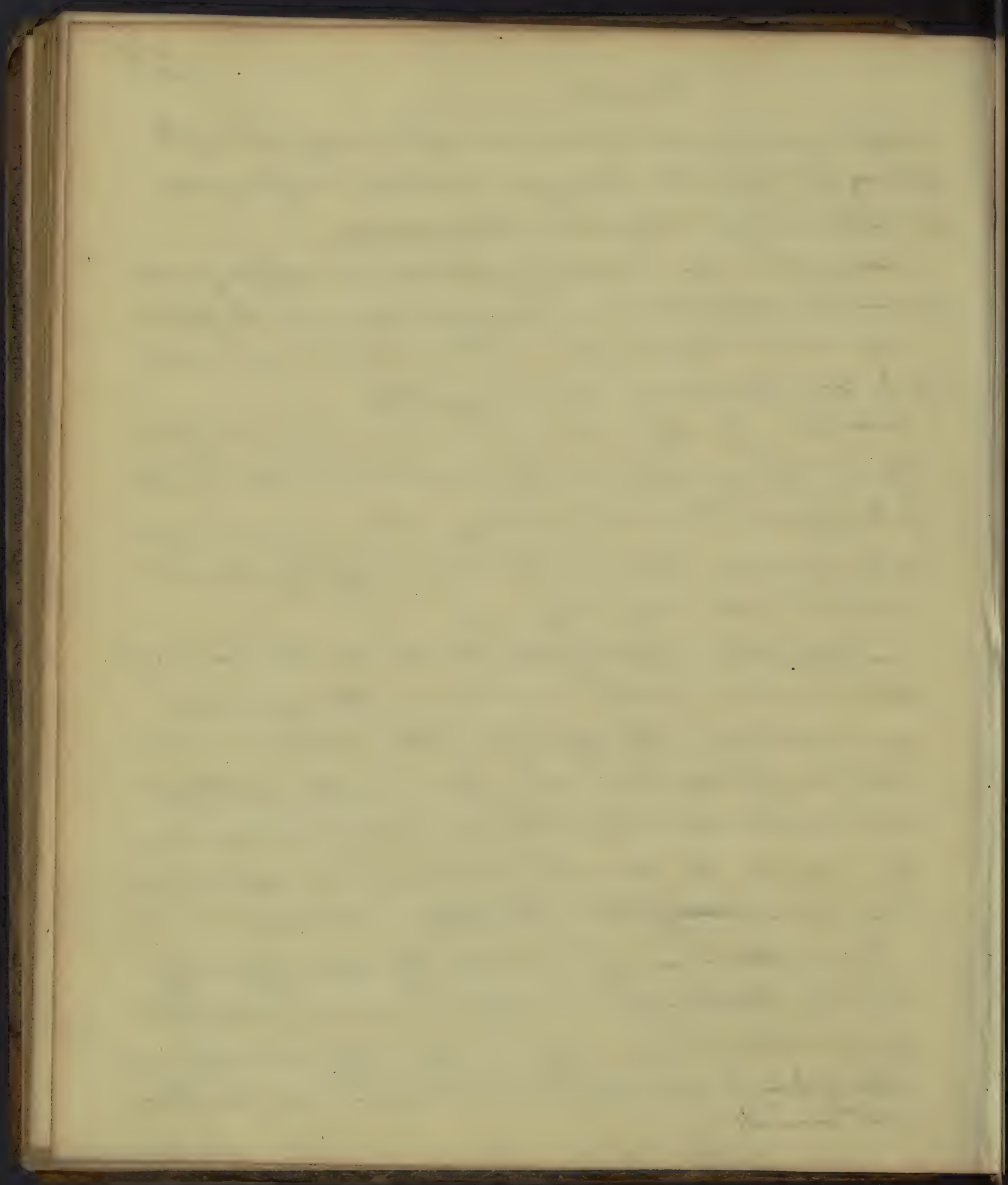
In covenant it has been said that if grantee does not notify the grantor to come and defend, he cannot on being evicted recover the special damage which accrued in consequence of the eviction but only the value of the land. I see no reason in this rule says ell. G.

Another rule. If grantor is not vouched in, he is not concluded by the judgment ag. his grantee - but if he is vouched in he is then concluded by the judgment. The mode of vouching grantor or warrantor is by a species of summons called a writ of voucher - Issued by the court in which the action is depending.

Quit claim deeds or deeds of release do not contain these covenants of which I have been treating. It is said however that a quit claimer may be made liable in covenant for defect of title and this in an action on the case for fraud. This is not founded on principle says ell. G. Grant. Such an action cannot be maintained according to the com law of Eng. 2 Sags. 128. This case overthrows that rule, tho' it is said this decision has been lately shaken by the 3 judges on late circuit.

If in an action of covenant ag. two the Plff obtains judgment by default or otherwise ag. one and is afterwards turned aside the other, by a special plea in bar or by general issue, judgment cannot go ag. either of them, for he is made as on a joint covenant and there is no joint covenant.





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The rule is different in case of bills for bills and not joint. Croj. 134.  
 Carth 361. 1st 284. B. & P. 188. In notes, and Bonds, and all contracts for  
 payment of money, it is frequently stipulated to pay the money by in-  
 -stallments - This subject is treated very comprehensively in the books. This  
 confusion has arisen from various causes - one cause is, the Books make  
 no difference between different forms of contracts whether by bond or bill &c.  
 neither do they make any distinction whether the sums to be paid are ag-  
 -gregate or not. I take it now that the law is well settled on this subject.

1<sup>st</sup> on a bond with condition for payment of an aggregate sum at differ-  
 -ent times, debt will lie for the first breach i.e. for non payment of the  
 first installment. This rule is laid down strictly, contrary by Coke  
 in like bill, and in his Reports. The rule laid down by Coke applies  
 only to single bills. 1 Atk 118. 1 Wils 30. 5 Mod 14. B. & P. 168.

But if a single bill is given for payment of an aggregate sum at  
 different times action of debt will not lie till the last installment falls  
 due. 1 Inst 42. 10 Co 128. 1 Wils 48. B. & P. 168.

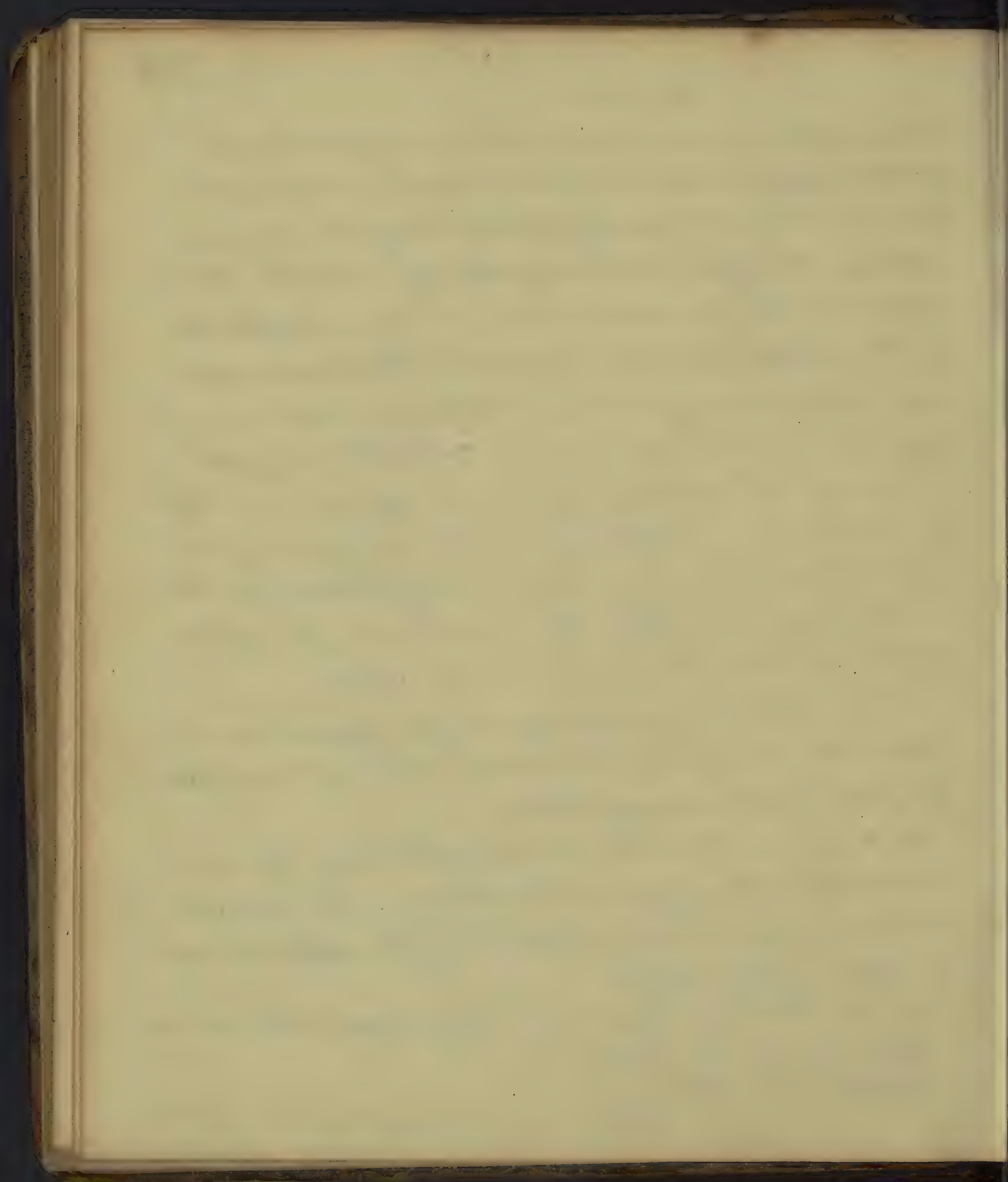
Now the difference between these instruments will be manifest if we consider  
 the nature of the two. In single bill the debt is one, entire, indivisible  
 debt. But in Penal bonds, by non performance of the condition the whole  
 penalty is forfeited at once.

We have Acts on this subject i.e. as to penal bonds and the court is  
 allowed to chance down the bond.

Stat. Court. 1st. Civil actions.

But as to rent it is always demandable and an





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action will lie at the respective times when it becomes due, whether there is any bond or bill in the case. and the venue may be by bond or by deed. The rent is considered as the remuneration of the issue of the land and is not due till the day of payment arrives, and there is no debt till the day of payment arrives.

Covenants and Promissory notes fall under different rules. If one covenants to pay an aggregate sum by installments an action of covenant will lie when the first installment becomes due, but debt will not lie upon the covenant till the last installment falls due. Rule is the same as to promissory notes. 2 Co. 218. contra 2 Co. 175. 3 Co. 22. 1 Hen. 4. 334. 7. Chitty 212. 2 Ch. P. 167. 6 Co. 80. 76. 80. 7. Salt 165.

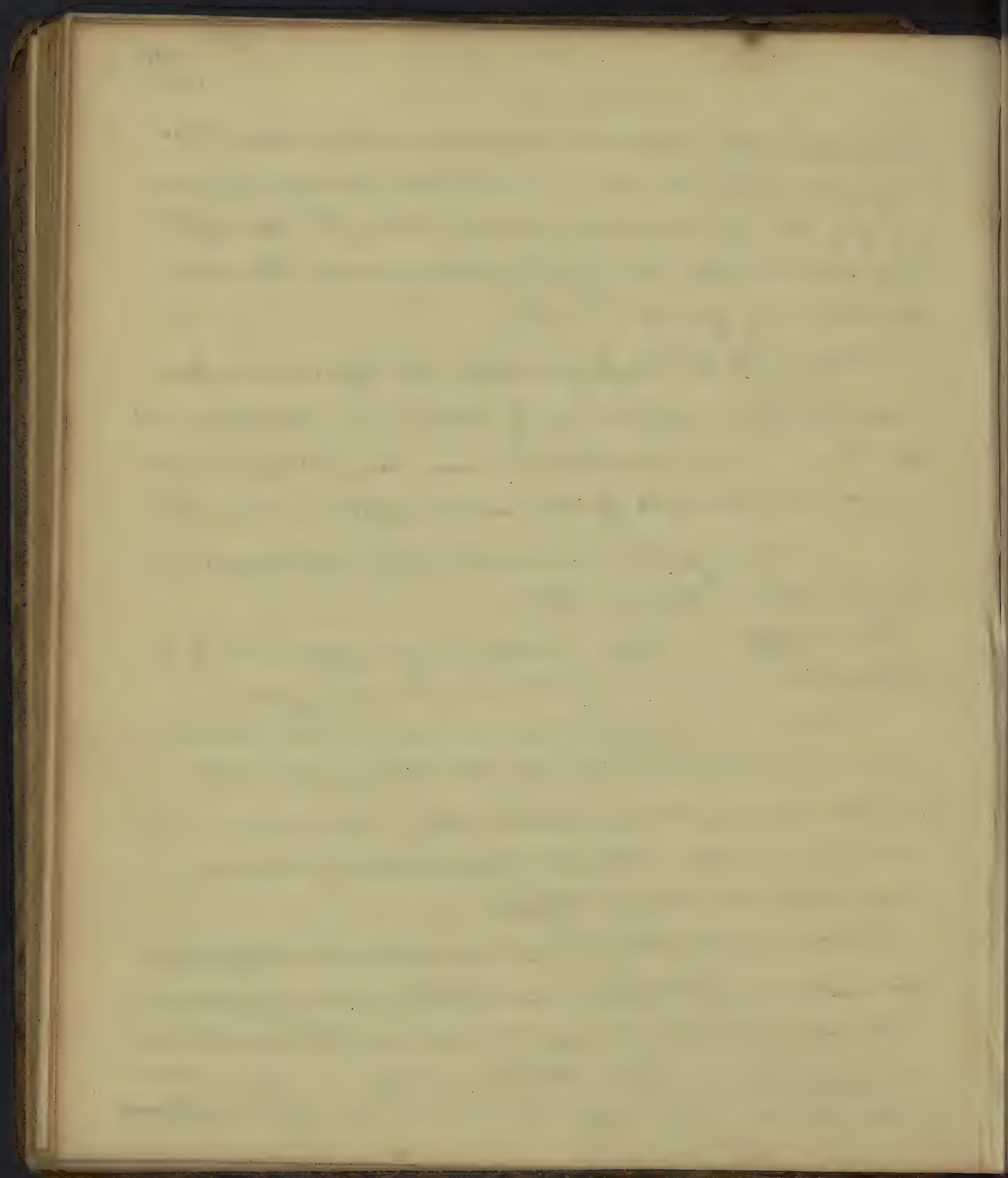
There is a difference between a contract to pay an aggregate sum by installments and to pay a sum by installment without any aggregate sum.

Where there is no aggregate sum in the case, an action will lie to recover as the installments fall due. 1 Hen. 4. 350. 2 Co. 115. 276. 80. 7. 2 Ch. P. 166.

Where a sum is payable by installments with a clause that on non-payment of one installment the whole shall immediately become due, is a good clause and will bind. Chitty 212.

This is not in the nature of an assumpsit consideration. Chitty 212. 2 Ch. P. 165. You will perceive that where a covenant to pay money by installment, there may be a number of breaches. Now the rule of pleading that in an action of covenant broken the P[er] may allege as many breaches as there has been. So if money is to be paid at four different installments,





and the action is not brought till after the 4<sup>th</sup> instalment has been paid and the Plaintiff must allege four breaches.

But if a penal bond is given for the payment of money by instalments the rule is the reverse, for he can only allege one breach on principles of com law, for one breach works a forfeiture of the whole penalty it would therefore be duplicity if he alleged more than one. 2 Vent 198. Comb 294 3 Balc 108. 2 Wils 293.

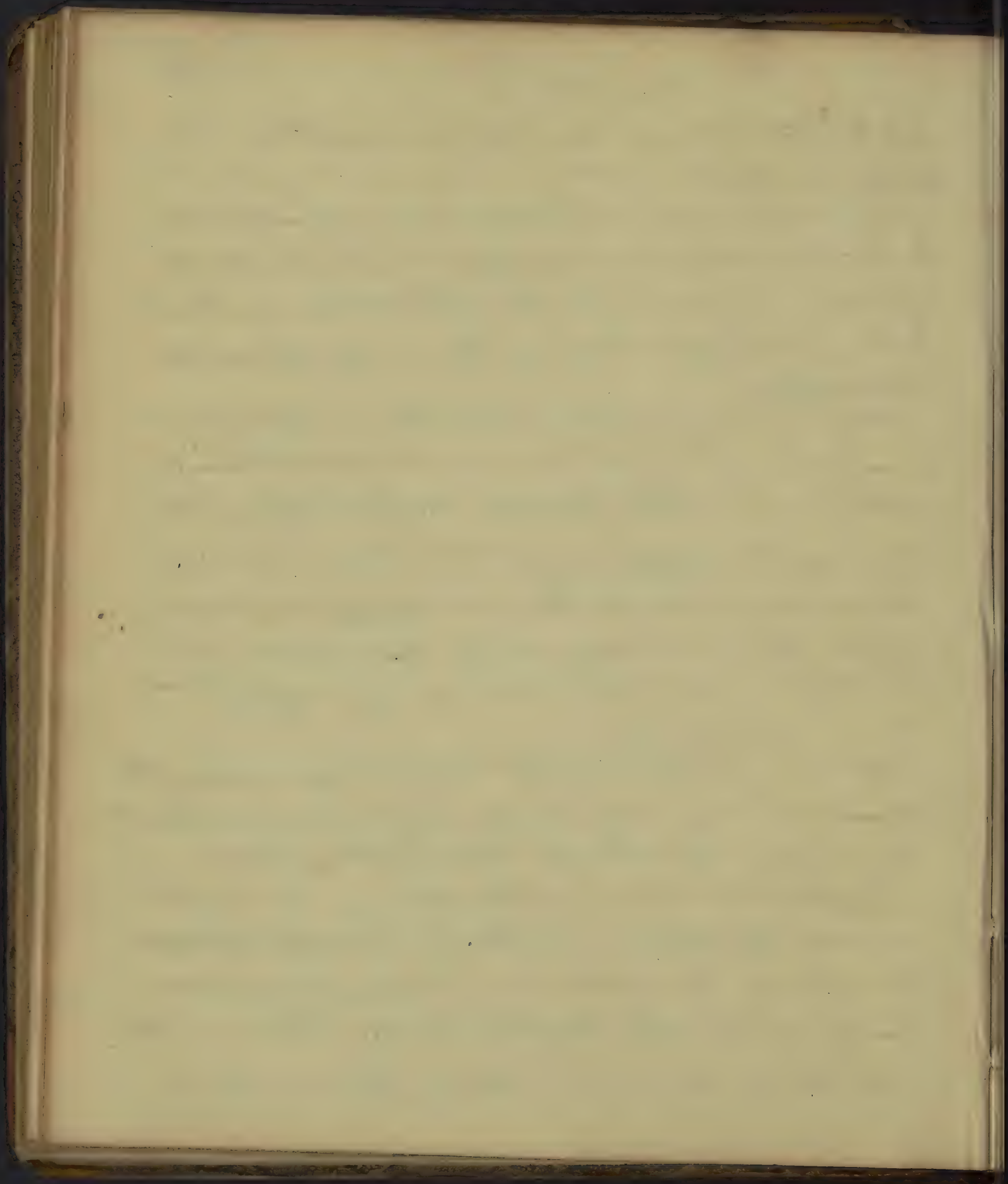
But the rule of pleading as to penal bonds is the same as the English rule in case of covenant, for our courts charge down the bond to the damages actually sustained. Nat. Lon. Lit. Civ. Actions. Now indeed in Eng<sup>d</sup> by Statute 3<sup>rd</sup> Mary II<sup>d</sup> may allege as many breaches as he pleases in case of bonds as well as in covenant. 1 Bac 544. 2 Wils 347. 2 B. & R. 1016. 1111. 2 B. & R. 320 3 B. & R. 126. But tho' at com law you can only allege one breach, yet this is matter of form only and can be taken advantage of only by special demurrer. Comb 297. 4 Bac 135.

Next who are bound by covenants? The personal representatives of the covenantor are always implied in himself, and if he is bound by a covenant they are also bound tho' not named. 1 W. & L. 128. 1 B. & R. 519. 2 B. & R. 194.

Exception to this rule where the contract is fiduciary. In case of indenture of apprenticeship the master & apprentice is not bound to teach the apprentice. The instruction was to be performed by covenantor himself. Co. 8. 553. 1 W. & L. 216. 1 B. & R. 33. 519. 2 W. & L. 269. But even in these

last cases where the covenant is fiduciary, there is a material





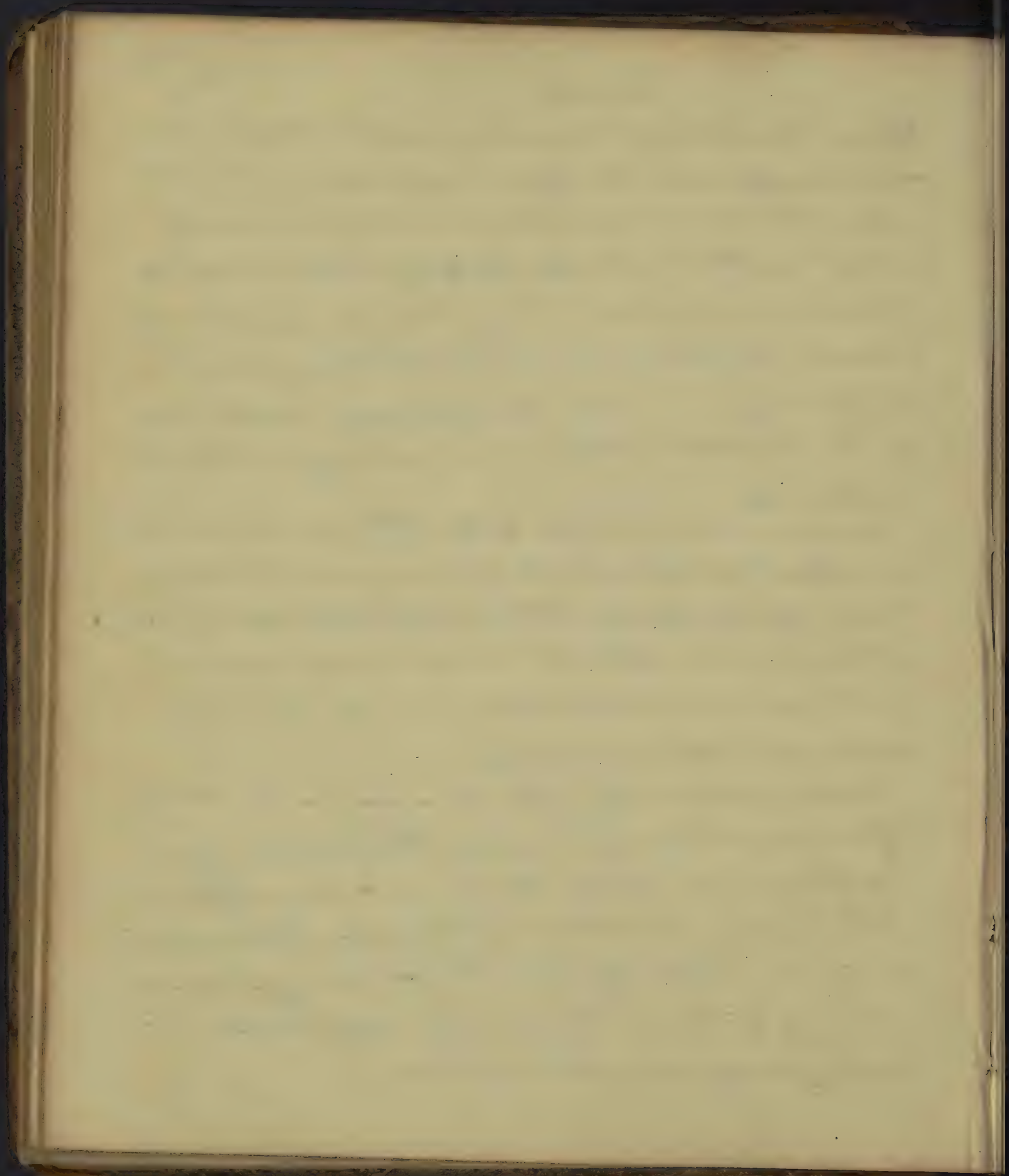
Difference between the duty of a personal representative to perform the covenant himself, and his liability for a non-performance by the cove-  
-nantor, for the personal representatives are liable for a breach of  
covenant committed by the covenantor during his life time. 2 Com 568.

So also an ancestor seized in fee may at com law bind his heir by  
a covenant - Thus if A seized in fee covenants to convey to B, and dies  
before the conveyance is made the heir of A may be compelled to con-  
vey it to B, and consideration money, will generally go to the Executor.  
2 Bar 213. 2 Vin 338.

So also a real covenant will bind the heir of the covenantor. So in last  
case suppose B had died now the heir of B may compel A to convey.  
Sch. 2 158. Exp. 2. 294. H. N. B 348. And as to covenants in deeds executed,  
if the covenant runs with the land, and appears designed to continue  
after the covenantor's death, his heir may sue upon it, even though not  
named. 1 Dougl. 11. Minner 305. 2 Com 561. 2.

The rules as to the liability of the heir as such, is in connection very  
different from what they are at com law. (Wt. Exor & Admin<sup>rs</sup>) It has  
been held in connection that the heir as such having <sup>by descent</sup> a part, is  
liable at law on his ancestor's covenants of seizin. This decision is  
not correct I think says M<sup>r</sup> G. This is your claim ag the Executor,  
and not ag the heir. In connection the heir may be liable on his  
ancestor's warranty under certain circumstances.





What covenants run with the land, and what do not.

And 1<sup>st</sup> the liability of a person on covenant of his assignor.

The assignee of a lease is liable for breaches of his own person<sup>al</sup> tho he is not named, provided the covenant runs with the land.

General rule - if the thing covenanted to be done, or concerning which something is covenanted to be done is in esse at the time of the covenants being executed, and parcel of thing demised, the covenant is said to run with the land - Remember if covenant runs with the land the assignee is bound tho not named. Suppose A leases lands, and buildings to B and B covenants to repair the building, and lease assignee the lease, now the assignee is bound tho not named, for buildings are parcel of the thing demised, and is in esse at the time of covenants being executed - do it runs with the land. The notion of covenants that run with the land is this, that the thing to be done is considered as annexed to the the thing demised and follows it.

§ 16. 24. <sup>a. b.</sup> Co. B. 457. 4680. To also covenants to pay rent during the lease is a covenant which runs with the land for the rent is potentially in esse, for rent is the issue or fruit of the land. Co. B. 353.

B. A. D. 159. 1 Dow. Cont. 152. 3. 1 Mod. 528. On the other hand a covenant by lease to build and all de novo, or erect a house on the land, does not run with the land and will not bind the assignee unless he is named.

— This is a collateral covenant, the wall is not in esse.



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is not parcel of the thing demised. 5 Co 16 b. 8552. 3 Burr 1271. 38 2893.

It also a covenant is said to run with the land if it goes to the support of the thing demised - but this rule supposes the thing in use at the time of executing the covenant.

So if lessee covenants to leave so many acres unploughed, this runs with the land, and will bind the assignee tho not named.

5 Co 17 b. 24. Ho J. 125. 3 Leo. 239. Ray 303. 2 Vent 228. 232.

But when assignee of lessee is named as by word "assigns" then he is bound to perform all the covenants whether they run with the land or not. 5 Co 16 b. 1 Bac 534.

But to bring a case within this rule, the thing covenanted to be done must be something related or annexed to the thing demised ~~a~~ premises, otherwise it will not bind the assignee tho named.

So if lessee covenant to build a house on land which is not the demised - now his assignee will not be bound tho named, for the covenant does not relate to the demised premises. This is a collateral covenant i.e. the act to be done is collateral to the demised, and can't be assigned. 5 Co 16 b. 1 Smith 352. Ho J. 438.

When the assignee is bound according to the distinctions already taken, he is so bound only for rent incurred, or covenant broken during his possession.

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If the covenant is broken by lease before apportionment, the apioneer is not liable for such breach. The apioneer is bound when bound at all, on the ground of his possession, or by reason of privity of estate between him and lease. 1 Free 336. Holt 177. Salk 199. 3 Burr 1271. Doug 443. 2 East 573.

The right of action against lease in case above, can't be transferred, and this is a further reason why apioneer is not liable when the breach was committed before apportionment.

On the other hand the apioneer is not liable at law for any breach of covenant by himself, after he has apportioned, for his privity of estate is gone the moment of the apportionment. Hence is a rule, if apioneer apportion to second apioneer even the very day before rent becomes due, he is not liable for any part of it, for there can be no apportionment of rent. Carte 177. Doug 735. 3 Co 22. Salk 31.  
1 Bond 350. B. N. P. 132.

And the rule is same even tho apioneer should apportion to a beggar, provided it was not a cotenable apportionment as in trust. It is said that when apioneer apportion before rent day - the lease may allege fraud in lease, and recouse on that ground, but this is not law. Holt 77. 166. Sta 1221. Amb 485. 10 Bro & Pat. 22. contra 1 Vent 329. 338.

Rule is the same if apioneer apportion even to a joint covenant. Doug 435.

Reason of this rule is similar to the reason of the former rule,



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when the estate is parted with, his liability is gone - he is liable on ground of estate, the lessee is liable on ground of contract & estate.

3 Co 22. But if a pledgee does apign to a vagabond for the purpose of avoiding rent, Chan<sup>y</sup> will compel him to account for rent, while he was in possession of the land. 1 Houlb 351. 353. 1 Ver. 97. 165.

If an apignee is evicted of part of the premises demised, the rent may be apportioned even in a court of law. But an action of debt will lie against the original lessee - for this grows out of privity of estate. But this is different if lessee is evicted of part. Lessee cannot maintain action of covenant broken - this will not lie unless lessee was evicted of the whole. 3 Co 22<sup>a</sup>. 2 East 575.

It has been a moot question in Eng<sup>d</sup> whether a court of Chan<sup>y</sup> can in any instance restrain an apignee from apigning to a beggar or a vagabond. This question is not settled. I think they cannot - no principle on which they can proceed says Ch<sup>y</sup> Gould.

+ 1 Houlb. 351. 2 Alk 219. 5418.

It was formerly doubted whether a covenant by a lessee not to apign his term was binding. It is now settled that such a covenant is binding. 8 TA 800. Cor 803. Exp D 276.

If then lessee does apign after he has made such a covenant, he is liable to an action of covenant broken. And under this rule a question has arisen - whether such a covenant is broken by the tenant's

being taken in execution by a creditor. But it seems settled that this does not break the covenant.

It is also settled that an under lease for part of the term does not break the covenant.

It also has been decided that such covenant is not broken by the lessor devising such tenures for this is not an actual assignment.

8 J. R. 57. 7 Vin. 85. 2 Eq. 9 cases. 100. 3 Wils. 234. 2 B. R. 766.

The lessor always remains liable to his lessee when there is express covenants, even after assignment, and tho' the assignee may be discharged, but lessor is not liable in debt after his assignment for his privity of estate is gone. 3 Co. 22. Salk. 199. L. R. 98. 100. Doug. 43.

11 W. 4 B. 1139. 1 Houtt. 353.

True rule is that debt will not lie after lessor has acquiesced in the assignment and consented to have the assignee his tenant.

Co. J. 334.

But on the other hand 'tho' lessor has accepted the assignee as his tenant, still if there is an express covenant he may have an action of covenant broken against lessor, for privity of contract remains. 1 Houtt. 354. Co. J. 309. 522. 1 Wms. 237. Co. B. 188. 1 Wms. B. 433. 444.

But if there is no express covenant, and covenant on the part of lessor is implied by law only, and lessor accepts the assignee for his tenant, he can't maintain any action against the lessor. if



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He has not accepted him he may maintain action of implied covenant against the lessee. This implied covenant is founded in privity of estate, and cannot be destroyed by act of lessee only but may by the concurrent act of both which is done by his accepting the assignee as his tenant. 1 Hen B. 439. Cro. 742.

36022.

Lessee may accept assignee to be tenant in a variety of ways - as by accepting rent from, or joining in the assignment.

1 Hen B. 438.

In many cases lessee and assignee may both be liable as we have seen - now when this is the case the lessee may pursue his remedy on express covenant as if lessee, and an action against assignee, and he may obtain judgment against both, but there can be but one execution enforced as well for costs, he has right to them in both cases. If lessee sues in obtaining both executions the party aggrieved may be relieved by an audita querela. Cro. 7523.

By Stat 32 Hen. 8's grantee of lease has same remedy on covenants which was with the lessor as the lessee himself had at common law, and by same Stat the lessee has the same.

remedy against lessee granted, as he had not covenant against lessee only. 14th. 6. 24th. 12th. 215. 10th. 522. 43rd. 279.

But grantee of lessee is liable only. he not touches as lessee during the continuance of his title.

Distinction between an assignee and a derivative lessee or under tenant. A derivative lessee is one who takes the conveyance of part of the residuum of the term, or who takes the whole residuum as tenant to lessee and not as tenant to lessee.

An assignee is one who takes the whole residuum of the lease as tenant to the lessee. 14th. 6. 24th. 12th. 215. 10th. 522. 43rd. 279.

A derivative lessee is not liable at all on the covenant contained in the original lease, and reason is he does not take as lessee - no privity of contract between ~~them~~ him and lessee, & no privity of estate. This is an important distinction. -

Doug 438. 174. 3rd. 234.

The same rule which holds in case of derivative lessees, holds also as to mortgagee of the whole residuum of the term, unless he takes by purchase (I am speaking of mortgage made by lessee) a mortgagee is not considered as a purchaser. If mortgagee takes by purchase the lessee may consider him as tenant. Doug 438 1 East. 502.



## Covenant

Specific difference between a pigment and a derivative lease.  
A pigment is a sale of the lease interest. An under lease  
is the creation of a tenancy under him. He who takes an ap-  
pigment is tenant to original lessor. He who takes an under  
lease is tenant to original lessee.

A pigment, or whole term are liable, on coven whether the apigment  
is actual or whether the title is derived by devise or by  
inheritance, or by being executor or administrator to the deceased's  
estate. 1177.

Question whether a pigment of part of the premises is liable to rent  
of any part of the rent? This question is not yet settled. My own  
opinion is that he ought to be liable, for the lessor by merely ap-  
pigmenting the lease, ought not to discharge a pigment from paying  
rent.

If lessor covenants for himself and a pigment as long as they shall  
be in possession, and the a pigment continues after the term has ex-  
pired he shall be liable for the whole time he is in possession.  
and liable on his covenant. Stiles 407. 2 Com D. 564.

Next How far these covenants extend to and against the heirs,  
executors and Administrators of the parties. And I would  
advise that in an action on any covenant by which the heir

is bound his own infancy is no defense. The covenant is not made by the infant but by the ancestor in this case. 42d 11.

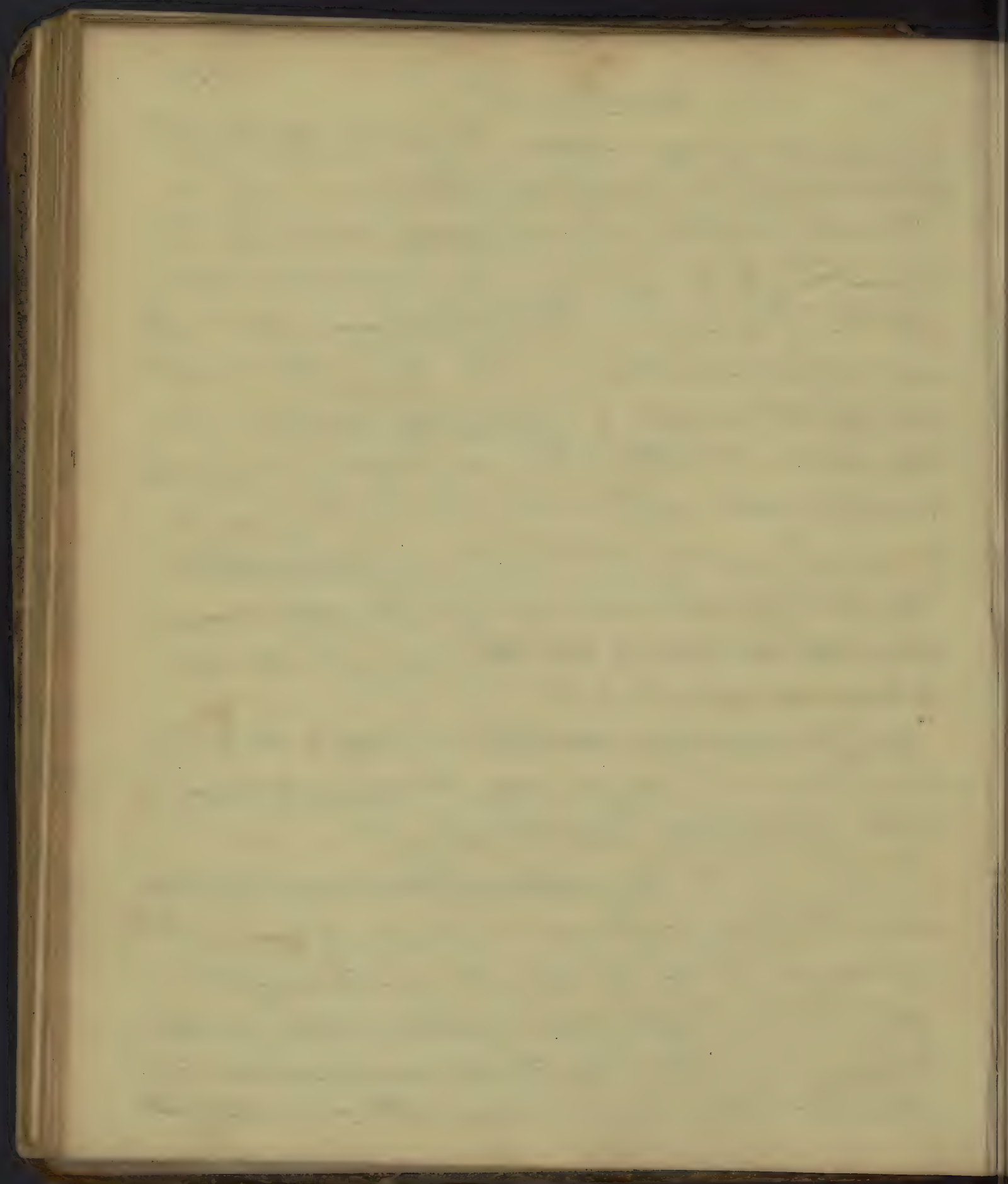
If a covenant with B, his heir, and assigns for covenant quiet enjoyment and the the covenant is real one, and covenant is broken in life time of covenantor his Exec<sup>r</sup> the next named shall have the action, and not his heir, tho' he is named. Reason is that covenantee claims upon this as reduced to a right of action during his own life-time. Suppose B, is evicted and dies, now his right of action accrues during his lifetime, and if he had died Exec<sup>r</sup> would have had the money, he ought therefore to have it now. 10ent 176. 347. Esp 2295

12th 26. The heir can have no claim in this action because his ancestor was evicted by elder title, and he could not be heir, for his ancestor did not own it.

But if covenant real is broken after covenantor's death, the heir and not Exec<sup>r</sup> is to have the action, the land has then descended to him. 11th 141. B. & P. 158. 2 Lev 92. Esp 2295.

If covenant is broken during lifetime of covenantor, his Exec<sup>r</sup> is liable for the breach, even tho' covenant is real, and reason is, the right to recover damages ag. covenantor accrued during his lifetime, his personal estate would have had to answer for it, it therefore ought now to be subjected. The Exec<sup>r</sup> of covenantor is liable for a breach of covenant happening after covenantor's death.





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He would not however be liable in the last case unless the cov-  
-enant is express - But his immaterial whether its express or implied  
if the breach was before the covenantors death. 2 Covent 563. Mod. A. 519  
Co. E. 523. 2 P. W. 197. 1 Bac 534. 1 P. W. 128.

Exception where the covenant is fiduciary. Co. E. 157. 2 P. W. 257.

If Executor or Admin<sup>r</sup> of free comes into possession in his official  
comes into possession in his official capacity, he is then a trustee, and  
is liable in that character for breaches during his possession, and he  
may be sued as a trustee, and described as one in the declaration.

1 Atk 309. 1 S. B. 4.

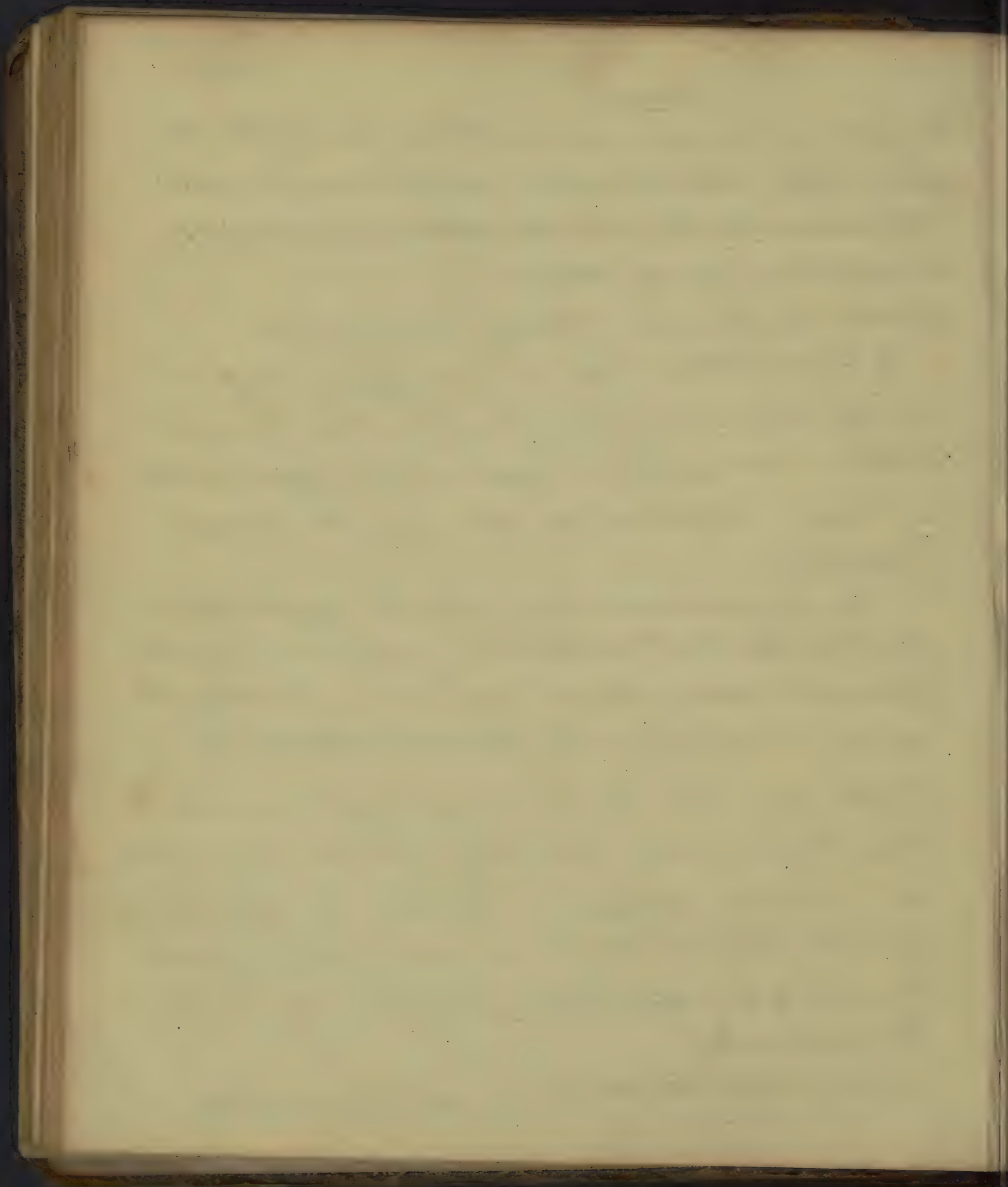
The heir of covenantor is liable for breaches arising both before &  
after the ancestors death provided he is a trustee, and his promise that  
he has a plot by descent; otherwise he is not liable. Both these requisites  
must concur in order to subject him. 1 Atk 334. 3 S. B. 370. 373. 3 Bac 27.

2 P. W. 375. & Covent. the action is to be brought on death of covenantor  
against the Exec<sup>r</sup> or Admin<sup>r</sup> and not against the heir. In general the  
heir is not liable as such for his ancestors covenants. It has been  
held on that the heir is liable if he has a plot by descent on a breach  
of covenant by his ancestor happening during his own time i.e. before  
the ancestors death.

Particular class of covenants.

Covenants to save harmless.



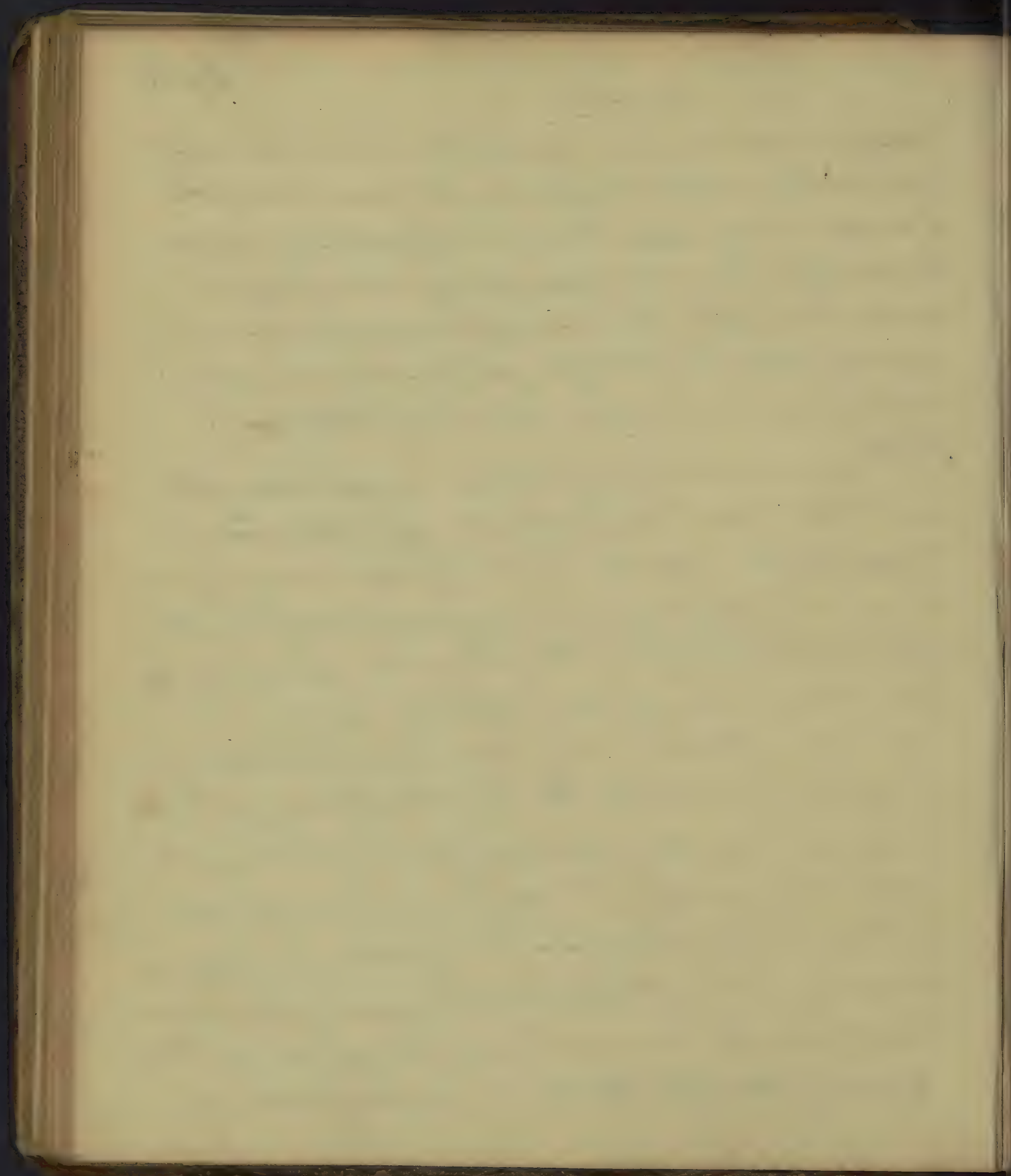


It defines itself in a new one by which the covenantor binds himself to save the covenantee from all expenses &c. This covenant is not broken by the tortious acts of another. A covenant of quiet enjoyment is in the nature of a 'covenant to save harmless'. A man of refuge covenants with his wife to save him harmless from all suit which she is to incur after her death, if the letters goods should be unlawfully distrained, he would not be liable. 4 Co 80. Ma 4. 4. Co 6312. Post 35.

2<sup>d</sup> 37. In certain cases a covenant to save harmless is broken by the mere liability of covenantee to sustain damages - the no actual damages have been sustained. Thus if a thief takes a servant against the owner's wish and the servant does escape, he may immediately sue on the bond. But he has never been sued by the owner. This mere liability is deemed to be a damnification. Co 653. 128. Post 510.

Now the damnification is merely legal, & constructive. The escape is a breach of the covenant and this was intended to be so by the parties. It also if a surety take a counter bond of indemnification, and the principal fails to pay the debt for which the surety is bound, the covenant to save harmless is immediately broken and surety may maintain an action on the bond. The non payment of the bond at time it is come due was an event covenanted against, and that is the ground of this rule, for there has been no damnification.





3 Bulst. 234. 5 Co 24<sup>a</sup> Salk 196. 1 Str 507.

This point has been decided in Concord, 10th 1840 - 10th 1840  
is that no payment at time is a breach of covenant. 2 Bulst 15 b.

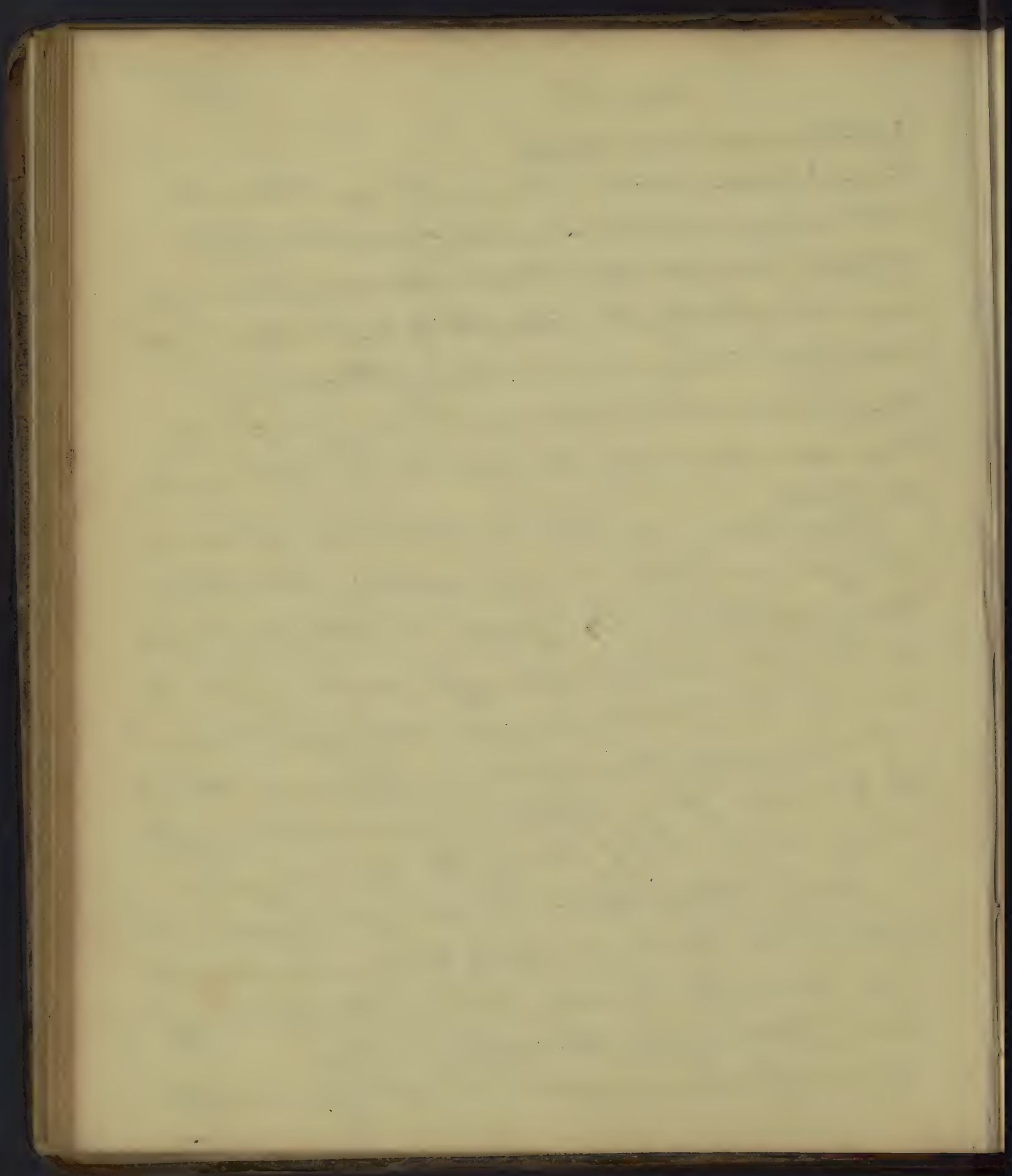
10th 507. But if the action will lie in these cases, the principal  
may be compelled to pay the creditor, altho he has paid the same debt  
to the surety. - So he may be compelled to pay the debt twice. But  
that in this case would no doubt compel the surety to refund the  
money which he had received. No I have seen no decided cases to  
this. 2 Str 104.

I should think an action at law would lie to recover this money  
back again, were it not for one reason which is, that in both cases  
the money was paid under judgment of court. I indeed it appears it would  
not lie - if it would the principal might set aside a judgment of  
court. But upon this point there is a material distinction to be observed.

If one having obligated himself to be a surety for another takes a  
bond of indemnity after his liability has accrued or attached, no right  
of action accrues on bond of indemnity till actual damage has  
been sustained. Suppose A & B execute bond to J. S. payable in six  
months, and after this time has elapsed the covenant is made to  
be sure B. does not fail. no recovery can be had till actual damage  
has been sustained by B. Salk 196. 2 Bulst 234. 10th 507.

no liability accrues amounts to a breach only in such cases





when mere liability works a change in the circumstances of the parties.

It follows then that if A and B enter a single bill or note payable on demand, and a covenant to B to save harmless, now B can never sue on this covenant till he has actually been damaged, for it works no change of the parties' circumstances. But a surety often does not take such a covenant to save harmless, and if he does not he may maintain a *action of indebitatus assumpsit* after he has actually paid the debt for his principal, but not before, he is not entitled to an action till he has actually paid. Formerly supposed that a surety in such case had no remedy whatever, but this is now exploded.

525. 2 R 104. 3 Wils 14. 12 R 599. Kely 134.

But if surety has actually taken a covenant to save harmless, and has paid the debt, he can't maintain *indeb. assumpsit* against the principal debtor for he has a higher remedy. 2 R 100.

2<sup>d</sup> from which covenantee retains over covenants after an assignment.

In the assignment of Bonds, notes &c the obligee may in some instances release after assignment, and in other not. Rule is. If the instrument is not negotiable a release by the assignor is good after an assignment. But if it is a negotiable instrument the assignor can't release it even at law. (See *Notes of Exchange*.)

In the former case the assignor retains his power of releasing it.



### Covenant.

But in the latter case he does not. If a lease after an assignment  
of a reversion extends to several tenants so that the assignee of the  
reversion may recover for all breaches after assignment, for the covenant  
runs with the land and is assignable since the Stat 32 Hen<sup>8</sup>, and  
according to some it was so at common law. 4 Bac 279. 2 Lev. 218. Co. b. 503  
2 Jones 112. 1 Deventer 315. But it is said that where a lease has been assigned  
by a lessee he may not be assignee of an action for breaches, even  
after the assignment, by a release given before action brought. This rule  
I think is not correct says Mr. G. - no principle of law will support  
it. But a release after action brought is not operative for the right  
has attached to his person. 8 Rep 308. Co. b. 361. 513. 2 Roll 411. 5 Com 235.

A general release by covenantee before the covenant is broken, of  
all demands does not discharge the covenant, for until the cove-  
nant is broken there is no demand.

But a release of all covenants before the breach discharges the  
covenant. 3. d. 2. 166. 1 Inst 296. Cro. 49. 10th 171. 2d Ray 515. 10th 38.

### Parties in Covenant.

In this action of covenant broken the declaration must always state  
the covenant is by deed therefore there can be no such thing as a  
parol covenant. Sta 314. Co. b. 517. Co. d. 108. 209.

But there are many written executory agreements which are

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at which point, and actions on such point, must be raised according in appropriate.

The general rule that when a party declares upon a covenant, he must make a proof of it. But there are several distinctions as to the necessity of making a proof, and for these distinctions see Tit. 24. 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100.

If the deed is lost the Pff may declare upon it as lost by time and accident and need not make proof. And the rule is the same if it is in the hands of the adverse party. 100. 101. 102. 103. 104. 105. 106. 107. 108. 109. 110. 111. 112. 113. 114. 115. 116. 117. 118. 119. 120. 121. 122. 123. 124. 125. 126. 127. 128. 129. 130. 131. 132. 133. 134. 135. 136. 137. 138. 139. 140. 141. 142. 143. 144. 145. 146. 147. 148. 149. 150. 151. 152. 153. 154. 155. 156. 157. 158. 159. 160. 161. 162. 163. 164. 165. 166. 167. 168. 169. 170. 171. 172. 173. 174. 175. 176. 177. 178. 179. 180. 181. 182. 183. 184. 185. 186. 187. 188. 189. 190. 191. 192. 193. 194. 195. 196. 197. 198. 199. 200.

When the covenant is general, a general assignment of the breach is good pleading, and the most general assignment of the breach is in the words of the covenant - Thus is covenant of residing and covenants that he is well seized of the premises. Now his sufficient to aver that the Grantor was not well seized &c. 101. 102. 103. 104. 105. 106. 107. 108. 109. 110. 111. 112. 113. 114. 115. 116. 117. 118. 119. 120. 121. 122. 123. 124. 125. 126. 127. 128. 129. 130. 131. 132. 133. 134. 135. 136. 137. 138. 139. 140. 141. 142. 143. 144. 145. 146. 147. 148. 149. 150. 151. 152. 153. 154. 155. 156. 157. 158. 159. 160. 161. 162. 163. 164. 165. 166. 167. 168. 169. 170. 171. 172. 173. 174. 175. 176. 177. 178. 179. 180. 181. 182. 183. 184. 185. 186. 187. 188. 189. 190. 191. 192. 193. 194. 195. 196. 197. 198. 199. 200.

Another universal rule is that the breach should be so assigned, as to appear to be clearly within the covenant. Thus if a free covenant not to cut any more timber than what is necessary for repairs, and the Defor should allege that he had cut timber to amount of 1000. This is not good assignment for it cannot appear to the court precisely how much timber was cut. Pff should allege that he did cut more than was necessary. 101. 102. 103. 104. 105. 106. 107. 108. 109. 110. 111. 112. 113. 114. 115. 116. 117. 118. 119. 120. 121. 122. 123. 124. 125. 126. 127. 128. 129. 130. 131. 132. 133. 134. 135. 136. 137. 138. 139. 140. 141. 142. 143. 144. 145. 146. 147. 148. 149. 150. 151. 152. 153. 154. 155. 156. 157. 158. 159. 160. 161. 162. 163. 164. 165. 166. 167. 168. 169. 170. 171. 172. 173. 174. 175. 176. 177. 178. 179. 180. 181. 182. 183. 184. 185. 186. 187. 188. 189. 190. 191. 192. 193. 194. 195. 196. 197. 198. 199. 200.



If the Mf having signed a general bond narrower is shown by subsequent words, he must confine his proof to the bond as it is limited by the subsequent words. So an allegation that Mf is guilty of bad husbandry for that he has committed waste - now Mf must confine his proof to the commission of waste. 31 R 317.

If now the deed contains a proviso depending the covenant in a certain event the Mf is not bound to take notice of this proviso. Its observance is left to the Mf to take notice of it.

Reason why Mf is not bound to notice it is that his is a defence, his is a condition subsequent, of which the Lf must take notice.

But the rule is different where there is an exception in the body of the covenant. This constitutes part of the covenant itself - is incorporated in the body of it. 2 Ray 65. Exp. 3. 311.

If a Lf does not by covenant and assigns as inconsistent tenets, unless joint, or several, it shall be rejected after verdict as surplusage.

As if Mf demise on a covenant dated March 21<sup>st</sup> and assigns a bond - demise to wit Jan<sup>y</sup> 1910 so his good after as Dist. the 282 and 330.

Where the covenant is in the alternative the breach must be assigned as to both - or else he shows no cause of action.

1100 330. That his necessary to distinguish between a covenant which is substantially in alternative and one which is only partially so. Thus if Lf has covenanted to pay or cause to be paid,

is not in the affirmative, and an allegation that he has not  
done is sufficient. 1 Bro 224.

If the Def has covenanted to pay money on the event of one of two  
contingencies, an averment that one has happened is sufficient with-  
out saying that it was the first which happened. 2 Day 132.

If the covenant is that an act shall be done by the covenantor or his  
assignee, and an action is brought against the assignee, the breach  
must be alleged in the disjunctive i.e. that the act has not been  
done by the covenantor nor by the assignee.

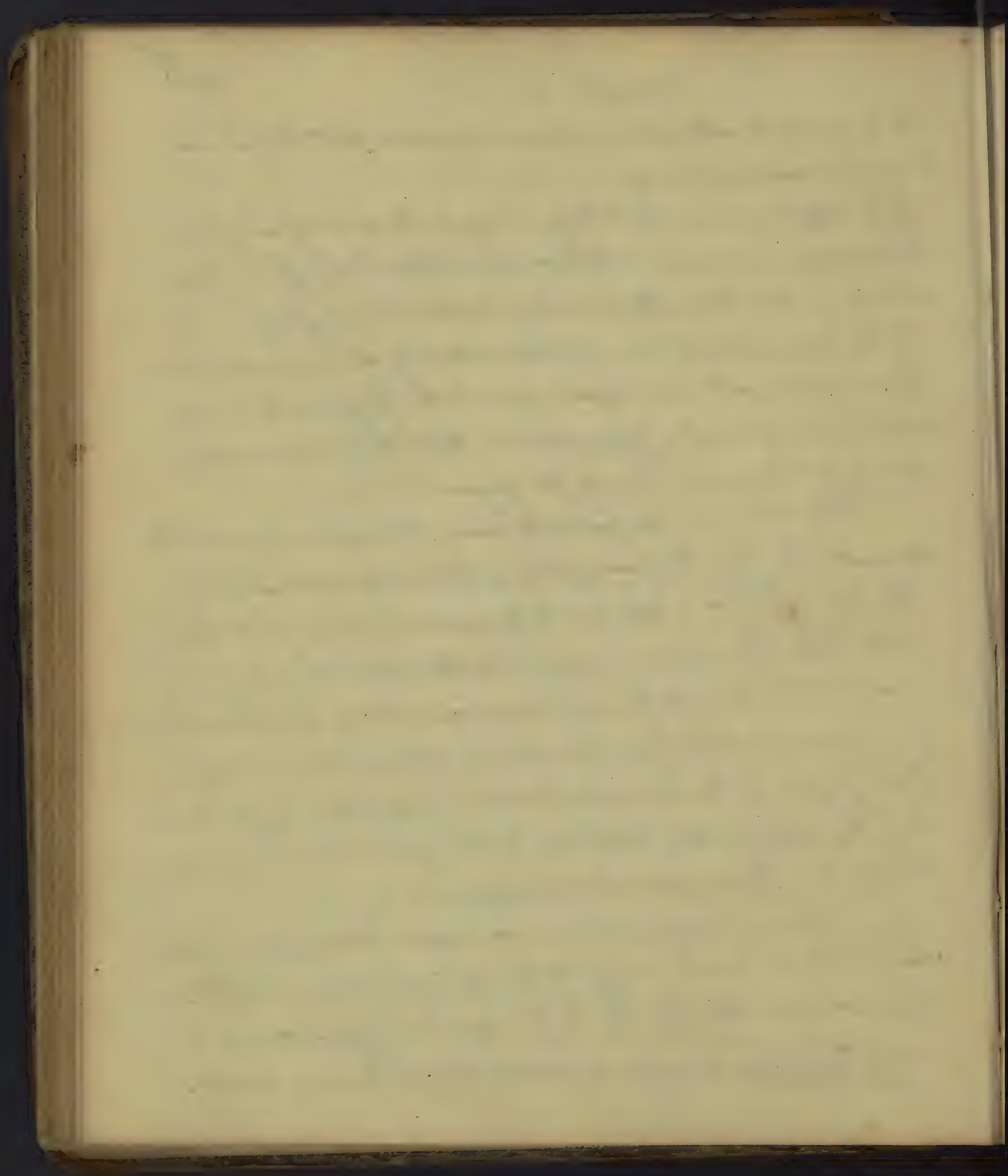
But this rule does not hold where the action is against the  
covenantor, for there the presumption is that he has not assigned.

1 Bro 228. But on a covenant to do an act in favour of the cove-  
antee or his assignee, an averment in the action brought by co-  
-antee that the act has not been done to him is sufficient.

It is presumed that there has been no assignment. But I suppose  
if the assignee of the covenantee should bring the action, he should aver  
that the act has not been done to the original covenantee, nor  
to himself. 3 Keble 440. 5 Mod 138. 1 Walk 139.

In an action on a covenant for a sum certain there can be no appor-  
-tionment of the demand, and if the breach said requires an appor-  
-tionment, it is not well assigned. If a covenant is to give £10 for 10  
years, and 10 years have elapsed, the breach assigned is many times over.





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the hundred — this is not well apportioned — it initiates the apportionment at the breach. But if the covenant had been to pay at the rate of £10 per ton then you may show non-payment for the fractional part of a ton. Attyr 19. 2 Lev 124.

But however the Jff apportioned as in the first case viz a ton to form many tons and he has died he may admit the wrong, and take judgment for the action. dash 668. 658. 874. 304. 1804. 66.

When the covenantor is to do some act precedent to his own right of action, he must allege a performance of that act. Holt 214.

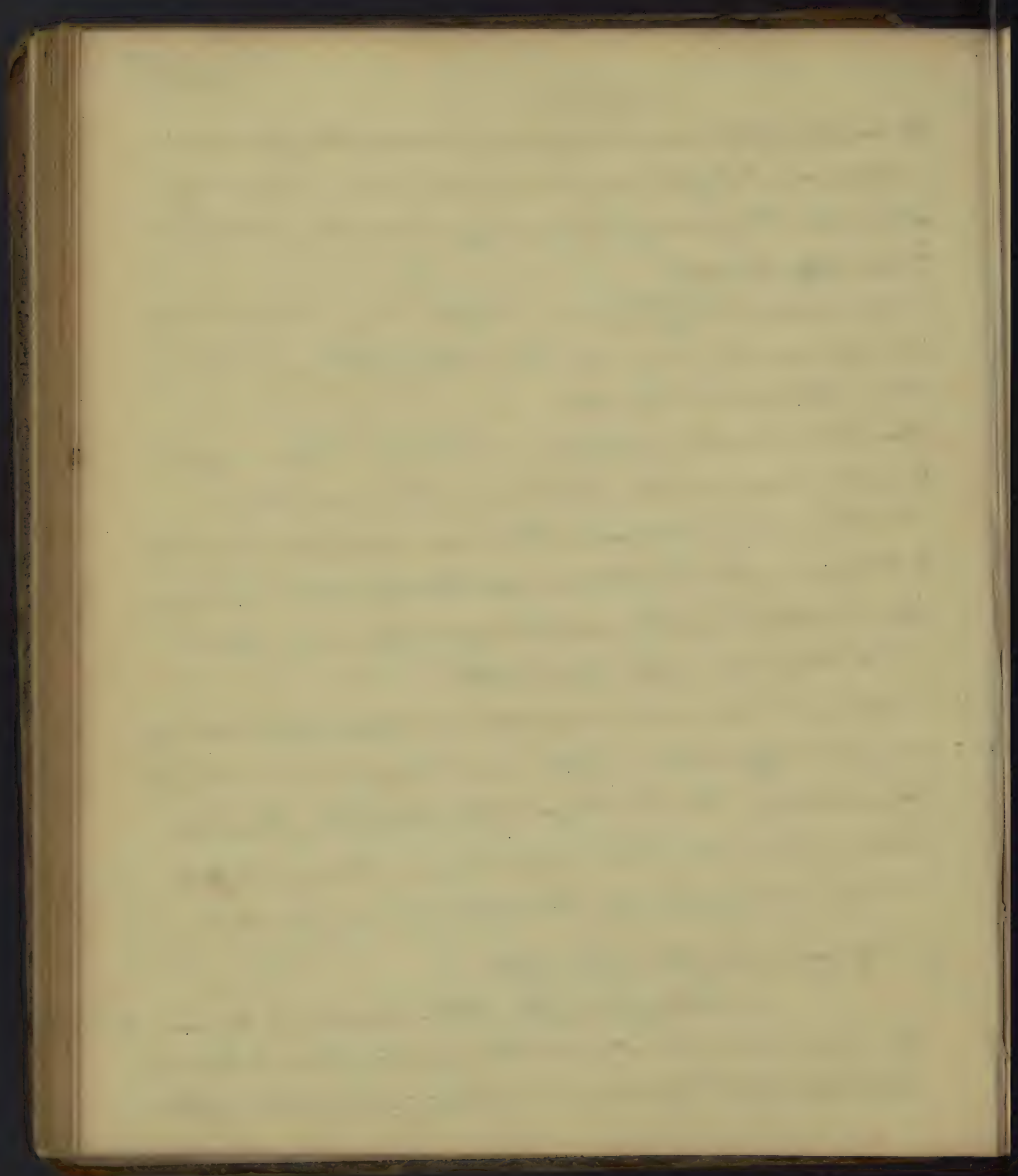
And the rule is the same where the precedent act is to be performed by a third person. And in all these cases the declaration is actually bad, and cannot be cured by verdict unless performance is offered. 1628. dash 171. 76. 2 Hen 4 3574. 83 2366.

But where the covenants are mutual i.e. independent, it is not necessary for the Jff. to aver a performance on his part in an action of covenant broken. Tho if he brings a bill in Chan<sup>y</sup> for a specific performance, he must then aver a performance on his part. Holt 33. 1628. 889. 7611. 1804. 339. dash 24. 615. 712. 1804. 920 note 3.

Allegings on the part of the Jff. —

As to the general plea that he has not broken the covenant, this is not good in law for it throws questions of law to the jury, and is even sanctioned by our books. 894. 278. 2202911. 134. 1312. 240156.





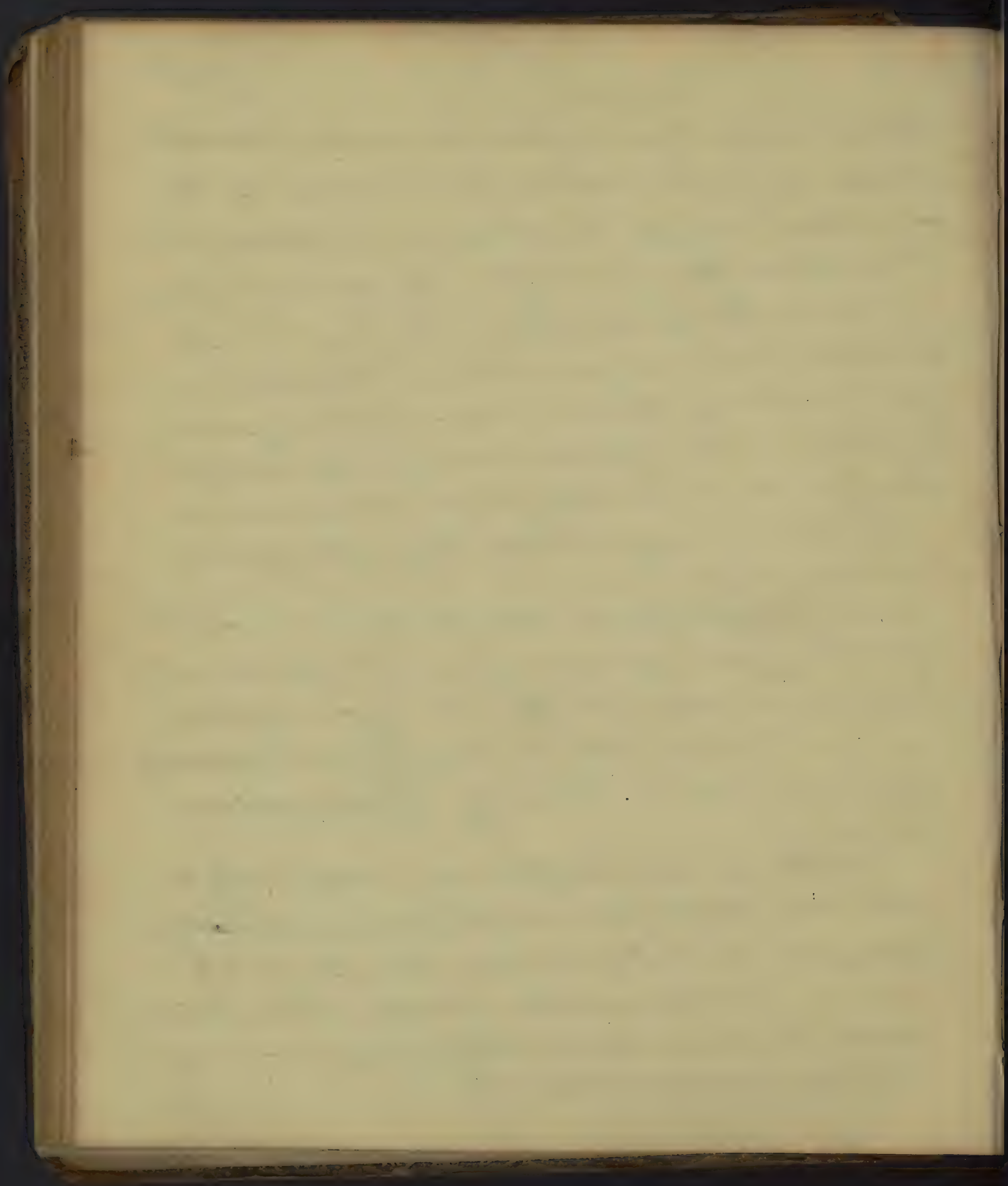
that would not be good if the declaration concluded and the Deft has broken his covenant - it would then form a direct issue. This is the argument of Quab. 2 Bl. R. 1312. It is laid down as a rule that when all the covenants are affirmative, this is sufficient for Deft to plead performance generally. 1 Inst. 303. 5 Com 88. 4 Bac 91. I cannot but think that this rule is not correct as a general rule. I think the most general rule is directly the reverse - however whether this is a general or special rule, it certainly relates to those cases where the things to be done are in some measure indefinite, either in kind, in number, &c.

If a covenant to convey to B all his lands, a plea of general performance is bad.

But if Deputy Sheriff covenants to return all writs delivered to him, a plea of general performance is good. So if he should covenant to perform all the duties of his office, plea of general performance is good. 5 Com 236. 4 Bac 91. The reason why general performance is allowed to be a plea is to avoid prolixity. Cro 8749. 916. 13 Mod. 643. Com 575. 515.

Another rule - where the Deft has covenanted affirmatively to perform several specific acts he must plead performance specially i.e. performance of each act - This rule is well settled, and surely the general rule as laid down in Books is understood as I have explained, is totally inconsistent with this rule. Cro 8749. Salt 149. Cro 735. 12 Co 363. 1 Sid 215. 1 Wms 117. 4 Bac 88. 5 Com 82. 257. 17 A. 173.





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As it has been lately decided in Complais in Eng that a plea of performance otherwise than in the words of the covenant is still a general demurrer - meaning is that he ought to show specially how he has performed.

1 Bos & Pul. 455. And where there are affirmative covenants which are very numerous, this general affidavit of breaches in the replication is good. 8 IR 459. 2 Wils 11. 12 R 482. 1 Bos & P 640. Doug 203. contra.

But where some of the covenants are negative, the Deft can't plead performance specially, but he must plead that he has not performed the acts which he covenanted <sup>not</sup> to do - If Deft pleads performance in negative covenants he is bad only, in special demurrer - his matter of form only. See 8 29 L. 691. 1 Post 303. 4 Bac 82. 91.

If a deed contains negative covenants some of which are void, the Deft is not bound to take any notice of them. Holt 13. 10 Ann 117 note 1 Ann 38. 256. But this same rule I suppose will apply to affirmative covenants which are void or some of which are void.

If the covenants are in the disjunctive the Deft must show which of the two acts he has performed. 1 Post 303. 36 133. Cro E. 232. 1 Sams 117 1 Ann 311. Where the covenant is to do an act which consists in some matter of law, as to make legal discharge or legal conveyance, he must plead specially and give words i.e. how he has performed, that it may appear to the court whether the act was legally done or not. Dyer 299. Holt 67. 107. 96. 25.





So also if the covenant is to do an act which must appear of record, Deft must plead specially *quo modo*, because the performance must appear by the record and the record must be tried by the court. In covenants on bond to save harmless the Deft may sometimes plead general non Damificatus i.e. that Plff is not been damaged, and in some cases he must plead specifically that he has saved the Plff harmless and show how he has done it. Rules to distinguish - if the covenant on bond to save harmless from any particular thing ascertained in the instrument, the plea of non Damificatus is not good, he here Deft shows how that he has saved the Plff harmless and show how he did it. See 374. 26.4. Co 6433. 1dand 117.

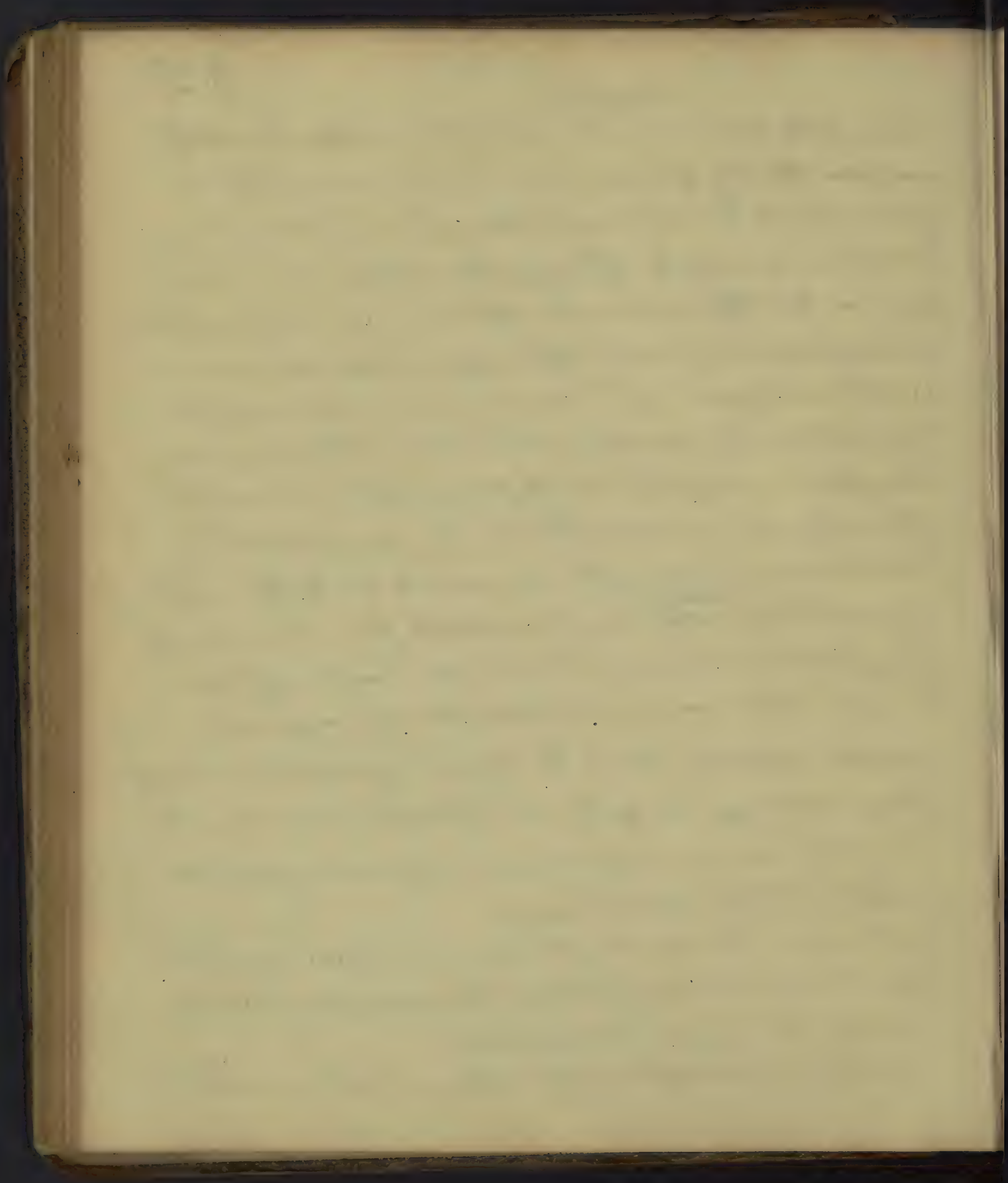
It is also to be borne in mind if the covenant is to save the Plff harmless in general terms i.e. <sup>from things</sup> which are not ascertained if he is to save harmless from any particular act covenanted to be done - non Damificatus is not good - performance must be pleaded specially and *quo modo*.

Co 875. 1202. 71. 2 Co. But if the covenant is general to save harmless from all costs, charges, damages &c and no specific mode of doing it is inserted in covenant - a plea of non Damificatus is good, plea. 2d. 916. Co 874. 3 mod 252. 5 mod 244.

But even in this case when the covenant is thus general yet if the Plff will take upon himself to plead affirmatively - he must plead quo modo. 2 Co 36. 1. Co 8. 910. Ho. 368. 654.

However if he plead affirmatively and does not plead *quo modo*, his





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matter of form and must be taken advantage of by special demurrer.

Ward 119. If bond is given for payment of money on a certain day, even tho it appears from face of the bond, that it was given for general indemnity, still the plea of non damnificatus is not good. 10 Co. 50. 658.

If the covenant is an act to be done by a stranger the performance must be specially pleaded same as if the act was to be done by covenantor himself. Co. 9. 59 a. 7. 2 Roll 159. 1 Moor 1. 5 Co. 40. 82.

In those cases in which his complaint for Debt to plead non damnificatus generally a dilatory plea consisting of a general traverse of that plea is ill. The Plff must in such case state special breach. 10 Co. 50. 658. 4 Bro 92. 154.

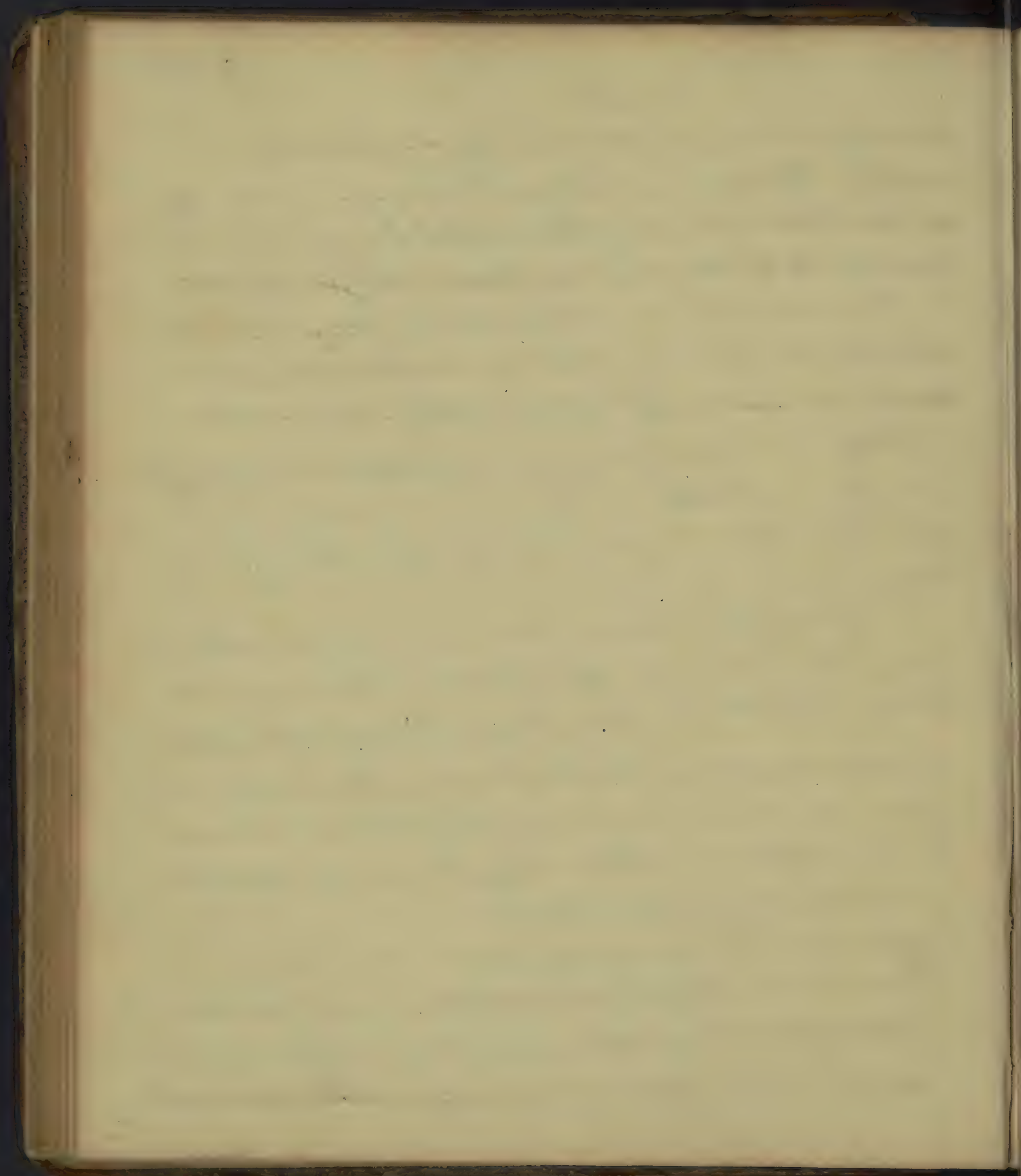
A covenant in one deed shall be pleaded in bar to an action on a covenant in another deed unless the former be in the nature of a defence to the latter. 2 Vent. 217. 2 Call 573. 2 Salk 273. Co. 9. 30. 623. 2 Inst. 406.

But one covenant may be pleaded in bar to an action on another covenant in same deed tho there are no words of defence, and where is the true construction of the deed is to be gathered from the whole instrument. 1 Bro 152. Moor 679. 6 RR. 797. 8 RR 483.

Joint, and joint and several covenants.

These rules will apply to joint and joint and several promises, bonds or joint contract of any kind is a contract by which two or more persons are bound jointly, and not severally, and the contract can





<sup>jointly</sup>  
A <sup>joint</sup> several contract is one by which two or more persons bind themselves jointly and severally.

A several contract is one by which an individual binds himself alone. It is a rule that if three persons covenant severally and jointly, all may be sued together, either may be sued alone, or each may be sued in a separate, distinct action. But he cannot sue more than one in one action, unless he sues them all - he must treat them either as joint or several, and not partly so. 4 Co. 26. 12 238. 3 Bac 698. 32 R 782.

But if the covenant is joint only, all the covenantors must be sued together. 11 R 393. 2 Ba. 99.

On the other hand there are two or more joint covenantees, obligees, or promisees, all must join in the suit - they must be Co. Pl. 22 R. 282. 2 R. 1146. 5 Co 186.

But if one of two joint covenantees or obligees is dead his Exec<sup>r</sup> must join in suit with the surviving covenantor - the right of action survives to the remaining covenantor. 1 East 497. 1 Bos & P. 445.

But in some cases where the covenant is with two joint covenantees in form - yet each may have a separate action, and in some cases they must join.

Rule is this, tho the covenant is in form joint and several, yet if the interest of the covenantees appears to be joint all must join. 5 Co 18. 1 East 497. 2 R. 1 Bac 532.

But on the other hand - if the interest of covenantees appears



tenants.

do to several, each may be jointly. So if A. promises B. and C. to do  
some work, and upon covenants to both of them, yet their interest  
is several, in each must sue severally. 5 Co. 13. 14. 7. 8. 3 Co. 157.  
10 Co. 153. From the distinction already taken it follows that the  
two or more coobligors or covenantors may bind themselves sever-  
ally for the same cause, yet two several covenantors cannot have  
two separate and several actions. 5 Co. 19. And if it makes grant to  
A. and B. jointly and severally - the word "severally" is totally inop-  
erative in a joint estate only they can't take severally unless the  
will divides the land, and describes which belongs to B. and which  
to C. 5 Co. 19. If two persons covenant jointly and severally each  
may be sued and subjected alone for the neglect or default of the  
other, tho' the other has been guilty of no neglect, for each coven-  
ants for the other as well as for himself. Sta. 5. 53.

And where persons bind themselves jointly and severally, a recovery  
of debt ag. one is no bar to an action ag. the other. Ho. 1. 78  
6 Co. 146. Inst. 251. And if one has been sued and his body taken in  
execution this will not bar an action ag. the other unless the debt  
has been satisfied. If there has been a satisfaction this will bar  
the action. 5 Co. 80. Chitty. 124. 162.

If one of two joint covenantors dies, his exec. is not liable to

Concord.

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Swampy, - But when his joint and several his Green? is liable.

Best 417. Where the words in a joint and several covenant are  
distinctive, it is construed to be a joint and several covenant - so  
covenant jointly or severally - the word or is construed to mean "and".  
Comp. 922. Gra 76.

Several persons are bound jointly and severally and one of them is made Excus. to oblige - the obligation at law is released, as to the whole i.e. as to all. 8 Co 136. Platt 300. 1 Inst 264. But in these? is a release as to all as to obligees representative but not as to his creditors and Legatees. Platt cases 140. 2 Inst 254. 11 Co 60. 9 mod 62. 10 Do 515.

If an instrument begins with the words "we, promise or covenant" &c. & signed by one only, his his sole obligation and may be sued as such.

1 Bar 323. 2 L.R. 32. And if the instrument recites A. B. C. were  
writing and only A. B. sign it. The court will say A. B. and  
not that C. never executed the instrument. 2 Stra 1146. 1 Bar 323.

29. 1. 37.

I take it to be a general rule that if two or more persons bind themselves together in one contract, as by a bond, note &c that contract is not of course the words to that effect are not used, unless it be clearly or expressly to be several - or words importing it to be several. 14th B. 276. 33rd 647. 5 Burr 2611. 20th 31.

If a covenant, note, bond, &c. begins with the words "I covenant &c."



Comment.

and I must sign it, now this is joint and secure. Peat's ca. 190

city 175. Ma 76.809. 22 May 544. Corp 882.

1 36  
Lecture March 13<sup>th</sup> 1810.

## Action of Account. Mr Gould.

This is founded on an express or implied contract. That one who has received the property of another to account, will render his account for it and if he does not the action lies. If he does not an account such as one as the other's property. Here is no need of an action of account.

This action lies against only three descriptions 1. Bac. 16 of persons at Com. Law. viz. Guardians in fee, 1. Inst. 1. 172. 173. Bailiffs, and Receivers - between joint merchants each of whom being a receiver for the other. 2. Inst. 1. 174. 175.

By Statute 4 Ann. This action is extended in favor of joint tenant or tenant in common against another as receiver for such others. 1. Bac. 17.

At Com. Law the action lies only between the original parties themselves, and not for or against their executors or administrators. —

The action is supposed to be founded upon the reciprocal promise of contract between the parties, 1. Inst. 1. 174. 175. as being cognizant to the receipt of the other. 1. Com. 2. 83.

To this there was one exception at Com. Law viz. in favor of the Executors of joint debtors to be not against their Executors.

But the Stat. 13. Edw. 3. and 41 Edw. 3. extended this action to Executors of joint debtors.



1 Dec 17 in *Lucas v. Davis* & also *the Stat. by Act* against  
13. 1. 164. the *Exec. W. & Admin.* as well as against their  
parties and substitutes.

As the English law now stands this is a *Receiver*  
to *Guardians*, *Bailiff*, *Receiver*, *Joint Tenants*  
in common and in *Exec. W. & Admin.* & *Administration*.

There is a distinction between *Bailiff* & *Receiver*  
for in the action is brought against any other  
person but *Guardians* the *Bailiff* must be charged  
as *Bailiff* or *Receiver*.

1 Feb 1777 A *Bailiff* is one who has received the property  
of another to imbue for the owner and to  
account to him - but is allowed wages for  
his reasonable expenses and trouble.

And this *Bailiff* is not liable to account for  
losses & profits which he might have made or  
with reasonable industry as for those which  
he has actually made.

1 Jan 1778 A *Receiver* is one who has received money to  
the use of another to account for but has no  
allowance for his trouble. So an *Attorney* who  
takes debts to collect is a *Receiver*.

But although it is a general rule that a *Receiver*  
1 Feb 1778 has no wages yet there is an exception to this  
1 Dec 1778 rule in case of joint merchants. They are  
liable to account to each other.

It follows then that *Bailiff* cannot be charged  
as a *Receiver* & *Receiver* cannot  
1 Feb 1778 be charged as a *Bailiff*. The reason why a *Bailiff*  
1 Feb 1778 cannot be charged as a *Receiver* is that he

would lose his allowance or wages.

57 May 17.

We also have a Statute on this subject: action of account is very common in Connecticut. Our Statute not only extends account to joint tenants and tenants in common but also to partners, <sup>that are</sup> and to Exec<sup>rs</sup>, <sup>and</sup> ~~apud~~ <sup>of the original parties</sup> ~~Admors~~ <sup>7th. & 11th. 1787</sup> and to Receiver in legacies of the Exec<sup>rs</sup>, and in favour of our Exec<sup>rs</sup> against another where the former is residuary legatee. Our Statute does not in the terms of it give the action against Exec<sup>rs</sup> or Bailiff and Receiver. But the action will lie against the Exec<sup>rs</sup> of the original parties and also it lies in favour of them.

This action is founded on contract express or implied.

It there'ore does not lie for a tort for it sounds in contract.

But there is an exception in Eng<sup>d</sup> in case of the King, and in case of infant. If a person trespasses on lands of infant, infant may have action of account against him as he may sue him in trespass.

1. Inst. 40.  
11 Co. 39.  
1. Inst. 413.  
Co. L. 24.  
2. Inst. 208.  
342.  
1. Atk. 487.

In an action brought against Bailiff or Receiver the Plaintiff states that he demanded money of the Bailiff or Receiver to account for, and that he refused to account to Plaintiff damages so much and then demands of Plaintiff his reasonable account and damages together with costs.



This small portion of account will not be where  
a sum certain is due so if it be £100 to  
B. it shall not have account for £100 but in  
the profits of it, and have debt for the £100.  
There is no reason for this rule, and I trust it will  
never hold in a sum certain to another to be ac-

1. Jac. 19. - cannot be action of account with lie. If a sheriff  
1. Com. 41. or just money on an execution action of account  
1. Inst. 4. 3. will lie against him. So it will lie against an  
1. Inst. 205. attorney who has collected money, no matter  
1. Brown. 70. if he has been advised that acct will lie for a  
1. Inst. 120. sum certain. Again he laid down that when one  
receives money to the use of another to render his

1. Jac. 21. account for it. The act. of acct with lie now I  
1. Com. 17. conceive this rule prohibits a sum certain. So  
1. Inst. 4. 4. money is delivered to be redelivered on a  
1. Mod. 101. certain event, acct will lie for it.  
1. Inst. 14. 116. If money has been received of A. for use of B. action  
1. Inst. 172. of acct will lie by B. but Plaintiff must state from  
1. Inst. 127. whom the money was received. It is said if  
1. Inst. 172. I deliver money to C. to be delivered to B. for my  
1. H. 119. use and C. does deliver it, I cannot maintain  
action against B for it. - But if a Bailee of goods  
sells or refuses to deliver them - acct will not lie, but  
1. Inst. 116. from conditions with for he is not to account for  
1. Inst. 17. it. He is to redeliver it specifically.  
1. Inst. 24. For will acct lie against dispaier for the profits  
of the land - This is a tort.

## Lecture c March 13<sup>th</sup> 1810 -

When the ground of liability is contract between the parties, it is a rule if c's ~~deputy~~ bailiff make a deputy, c cannot have an action against the deputy for there is no privity between c and the deputy -

c has his remedy against his Bailiff <sup>1 Roll. 178</sup> and the bailiff may have his action against his deputy. <sup>1 Roll. 100</sup>  
<sup>1. said tit</sup>  
<sup>1. said 2.</sup>

c's action of ass't can never be maintained against an Infant because he is supposed to be incapable of accounting. <sup>1 Roll. 117</sup>  
<sup>1 Inst. 172</sup>  
<sup>1 B. c. 17</sup>

If he who receives the property of another to account makes a special promise to account <sup>1. Roll. 9</sup> he then concurs with a promisor a promisor <sup>1. Roll. 139</sup> will lie on that promise. <sup>1. Roll. 164</sup>

But in such cases as this Lord Holt said the Plaintiff should not go into the particulars of the case but only show the special damage sustained. This means that he would not suffer the accounting to be gone through with but leave it open to an action of account.

But I take it that now this dictum of Lord Holt is not law and that in case a promisor <sup>1. Roll. 31</sup> <sup>1. Roll. 277</sup>





costs for the trouble of the auditors

The auditors shall make out their reasonable costs and return them with their award to the court.

Before the auditors the parties have a common right a right to testify but before the court they cannot testify at all. Rom. Law  
proof must be adduced to the court and by Statute the parties may be compelled to testify before the auditors under oath under pain of imprisonment in case of refusal, and one party may compel the other to testify.

But tho' the auditors have this power over the parties when they have appeared before them, still they have no power of compelling their appearance, neither can they compel the Defect to produce his writ. and if Defendant does not attend, ~~and~~ or if he attends and refuses to produce his writ. then the auditors may give the Plaintiff his whole demand.

Now these powers are not given to the auditors at Rom. Law.

In Connecticut, if the Plaintiff is found in arrears the auditors may not only find costs for Defect but also give him damages

57  
Stat Con. 37.  
2 Lev. 150

2 Stat. Con.  
Tit. Auditors

Stat Con. 36

2 Lev. 150



What defence the Defendant has in bar of  
the action, and what a plea of <sup>12</sup>12th be  
auditors. Now there is a material difference  
between a plea in bar before the Court and a  
plea of accounting to the auditors.

A plea in bar is before the Court and before  
the auditors are appointed, and is a plea  
to the action.

A plea before auditors is general "that the  
Def. is not in arrears" and is a kind of  
general issue.

As to pleading in bar it is competent for  
the Defendant to plead non est, which  
shows that he is not bound to account on a  
any plea which does not go to show this is  
a bad plea.

1 Rob. 121 It is a good plea in bar therefore that he was  
1 Com. 91 never bound by the action when paid is such  
and this is the general issue.

1 Rob. 123 Upon the same principle a release of all actions  
1 Acc. 20 is good plea in bar & a release of that par-  
4. do 55 ticular action is a good plea in bar.

In the same principles also an award of arbiters  
that Def. should be released by the award is a good  
4. do 82 plea in bar. In this award has all the force  
4. do 55 of a release. It is equivalent in its operation to a release.

is said that a plea by the Deft. that he received  
the money & delivered over to P.I. and that  
he did deliver it is a good plea in bar -

Now I say this is not a good plea in bar unless  
it is considered as a denial that the Deft.

was ever Bailiff or Receiver. But if it were

so considered the plea would then be faulty -

on another ground, for it would throw

amount to the general issue, which cannot

be specially pleaded -

If this plea allows that he was once accountable

his proper defence before auditors -

There is a difference of opinion on this subject  
in England -

A plea that Deft. has made pay to an officer -

how to Plaff. is not good plea in bar -

he was bound to account - so a payment is no bar -

This is a proper plea before the auditors and

again this defence is proper matter for accounting.

So also that Deft. has fully accounted is good

plea in bar, for if the Plff. has had his rea-

-sonable acct. there is no ground for action -

But suppose Plff. denies that Deft. has ren-

-dered his reasonable account can Deft. then

go into the account at large? No. He cannot.

1 Com. 91.4

1 Robt. 122

-126

Cro. E. 880

3 Rits. 115.

1 Robt. 123

-22

-667

3 Rits. 113

1 Com. 91

1 Robt. 125.



## Seciure c March 15<sup>th</sup>

It is a rule that if the Deft shows that he has  
ever been made liable to account no special  
plea in bar is good unless a plea of fully  
accounted or a release or something indicating  
a release, etc. etc. or an award that Deft.  
should release is good.

But it is obvious that other defenses than these  
may avail the Deft but they must be made  
before the Auditors.

From the rules already laid down it  
appears that

the Deft cannot plead in bar any  
thing but the general issue or never Bellig  
or Receiver or fully accounted or release  
or something tantamount to release by way  
of a special plea in bar. Further the  
Deft must fully account and release  
must be specially pleaded and so must

3. 11th 113. the one thing in the nature of a release and  
2. 11th 113. this rule is the same in substance notwithstanding  
standing the statute.

After the judgment "Good computed"  
and while the action is pending before the  
Auditors the parties may join issue either  
in law or fact, and it is said that the issue

must in such case be sent back to the court  
to be tried - but this wants qualification  
for the matter of accounting cannot be sent  
back. But if the issue is any particular  
specific fact, or if issue is in law, then it  
is to be sent back to the court and tried.  
But if the issue puts the whole general acc't  
in issue it cannot be sent back to court.

In Connecticut a question of fact is never  
sent back to the court but issue in law is.

Another rule is that whatever can be pleaded  
in bar of the action must be so pleaded so as  
cannot be pleaded before the auditors.

This is a general rule also that nothing can  
be pleaded before the auditors in contradiction  
to what has been pleaded before the court.  
But on the other hand it is good accounting

is left to plead before auditors any  
thing which could not be pleaded in bar  
of the action but shows that he ought  
not to be accountably liable.

This also good accounting before auditors  
that the goods were taken by robbers or  
by enemies but this is no plea in bar, for it  
is no reason why he ought not to account.

But is not good accounting that the goods

1. Bro. 34 - 566

1. Bar. 21

1. 3. 4. 94 - 117

1. Leon. 219.

1. Bar. 21.

1. 20. 6. 32 = 116

3. Wilson 73 - 121 - 118 -

3. Wils. 113, 114

Bro. B. 82.

2. Day. 116.

1. Role. 124

1. Inst. 89 a.

1. Com. 3 ut. acc. 8. 11

1. Inst. 89.

1. Com. 91.

1. Inst. 89.

1. Com. 91.

1. Inst. 89.

1. Com. 91.

1. Inst. 89.

1. Com. 91.



2 mod 185 being possible I left out the one - and if  
1. Dec. 21 and the Purchaser is not able to account  
1. Dec. 23 for them - for a Justice has no right to take  
1. Dec. 24 goods on credit without licence.

2. Feb. 187 In action before Judge Minister of Justice  
R. J. 37 Auditors never are appointed - The Justice  
takes the acct. himself.

Our Statute law prohibits that in action an  
Accountant of his own B. 17. Auditors may  
be appointed, and the Auditors process  
in action Act.

But our law do appoint him from County of  
St. John. & the Superior Court upon a Judgment  
on an award of auditors.

3. March Com. In the action of acct. in England the H. J.  
14. 7. 2. 181. cannot compel a disclosure of books and  
1. Dec. 16. papers nor compel the party to testify under oath.  
What our Statute has by inflicting a fine  
on auditors all the powers of a Court of Chancery  
in this action of acct.

When the award is returned to the court if  
either party is dissatisfied with it, he may  
apply to the Court to be relieved against  
it.

In connection of the auditors and  
their commission their award must be  
set aside as if they should allow sett-off  
in such thing as they ought not.

If also if they mistake upon their own principles  
the award will not bind - as a mistake in  
figures or calculations -

1 Root 265

- 413 -

To also if a witness make a mistake in a  
point of law upon a given state of facts the  
award may be set aside -

2 Day 116

On Computation the party objecting to the  
award does it in the form of a Remonstrance  
addressed to the Court, in which he states his  
grounds of objection -

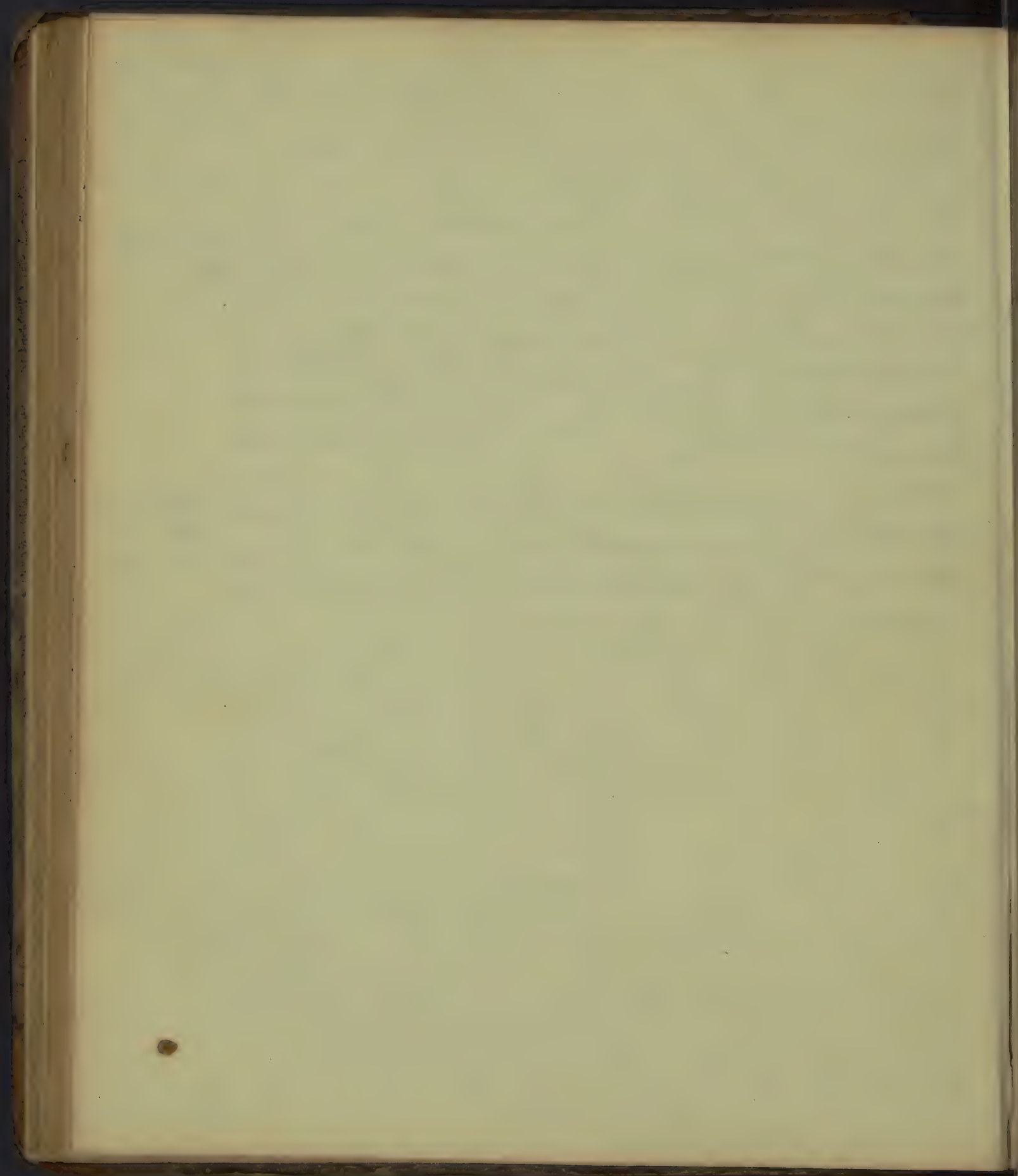
Where it appears from the face of the award  
itself that a mistake in law has been made  
the Court will set it aside as a matter of  
course.

Kearse 352

1 Root 157

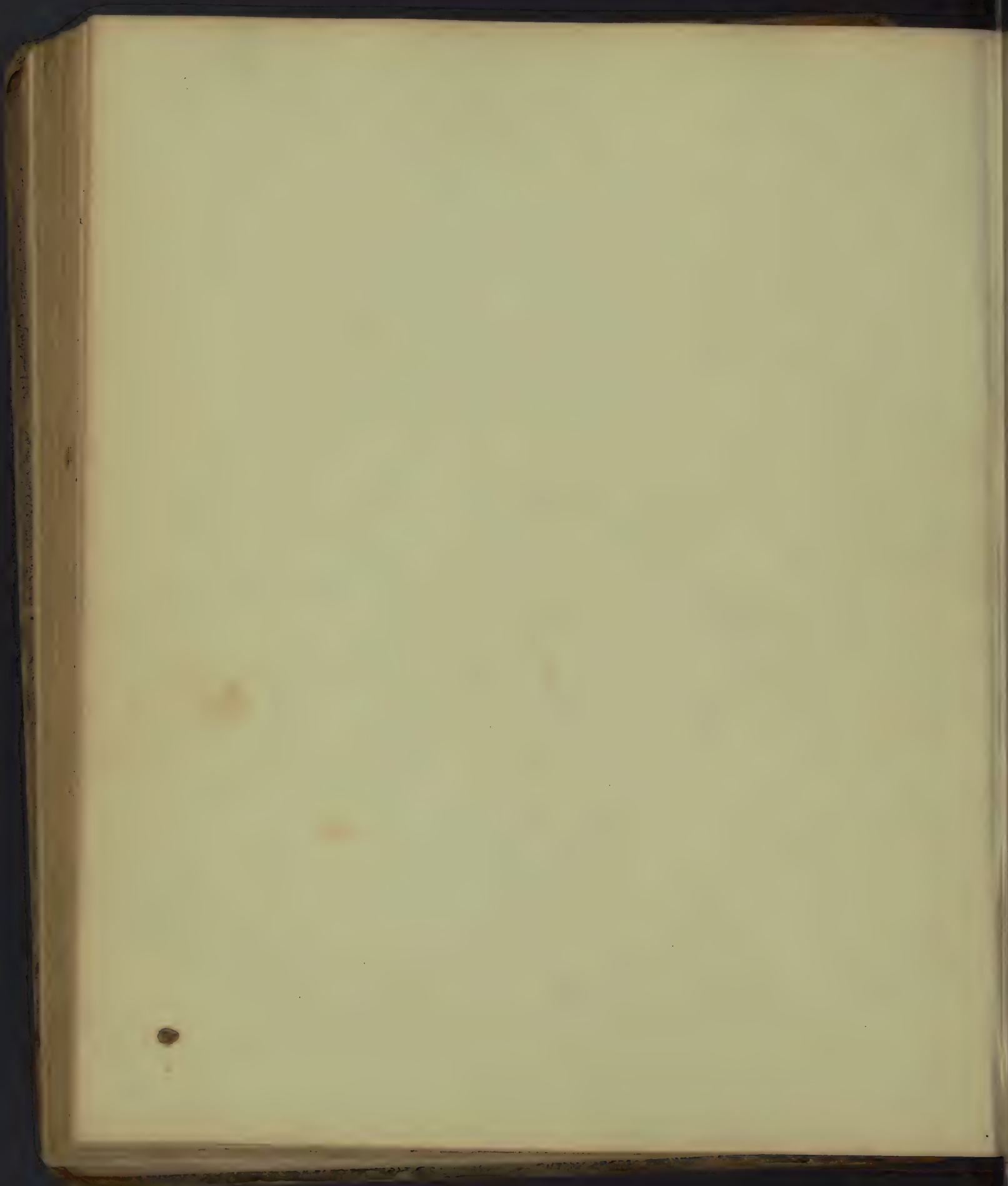
261. 268





63





# Defences to *Assumpsit*.

## Tender

Tender is a good defence in all cases where there is a debt <sup>or duty certain to be performed</sup> certain to be paid - secus when uncertain, depending upon the judgment of juries, and founding in damages. Tender is a defence in case of assault and battery. But it holds a note of £100 against B. Tender is good. So where C engages to build a house for B - C tenders performance and B refuse to let him - the tender is good.

The debt need not be certain in point of fact, yet if it occurs within the maxim id certum est, <sup>certain</sup> quod habet reddi. Tender is a good plea if it can be measured by some known standard - secus if it cannot be measured. Tender is 1 Sha. 5<sup>th</sup> 6<sup>th</sup> Considered a good plea to an action of *assumpsit* on a quantum meruit.

Tender is an offer to pay a debt or discharge



a duty. The tender must declare on what  
amount the tender is made i.e. to pay  
such a debt &c.

24th 70 otherwise the tender does not know to what  
200 5 notes debt it is assigned to be applied. This  
114 is dispensed with if there is but one debt.  
3 Dec. 104

So where he tendered in bags and said  
"here take your money" it is not good -  
he should have presented it if he need  
not count the money -

It has been decided that if the tender  
comes to the tenderer and he absconds, an  
actual offer is not necessary and a  
tender is a good plea.

It is a question not yet decided, whether  
a tender is necessary when the tenderer  
comes and the tenderer says "go off I will  
not treat with you".

1777  
1 Dec. 8. It is however decided that an agreement to  
- 686 transfer an offer is a good plea - an actual  
transfer is not necessary, occurs formally.

65

The tender is not good unless the whole sum be tendered. For a man is not obliged to take his money by parcels - If more be tendered than is due - the tender is still good - The law only requires the sum due.

Sometimes debt is to be paid in money at others in articles.

If the debt is to be paid in articles or money at the election of the tenderer, tender of either is good, but if at the election of the creditor the tenderer must go prepared -

If money is to be tendered, a question arises what money is to be tendered? The answer is - that money which is made good by law - copper coin is good tender to make change but not to pay any considerable sum -

Current coin of the U. States is good tender. no precise rule as to the quantity of change.

Exception Whether it after a tender, money depreciates, a second tender of the same quantity i.e. of a sum equal is good. It has been decided in Scotland that it is good, and



sect. 115

on principle it is clearly correct. It could  
never be other ways. That if money is tendered  
and received, and happens to be counterfeit  
tender has no remedy. So it is not true.

If both parties suppose it good, the note is  
discharged, but if payment is made to recover the  
balance due.

In the U. States Bank notes are no tender -  
the reason is the banks are so numerous.

In England it has been decided in Chancery  
that Bank notes are a tender if no objection  
be made to them on that account.

If tender be made in articles they must  
be merchantable in point of quality, and  
this is to be determined by the circumstances  
of the case.

### The effect of a Tender.

The effect of a tender is different in different  
cases.

Sometimes it discharges the debt or duty,

and in them, only the damages.

In all cases where a lien is created, tender discharges it - as a mortgage of land tender being made at the time the money is due discharges the land.

Whenever heavy articles are to be tendered - a tender of them discharges the debt or duty, as a promise to deliver ten head of cattle, here tender of the cattle discharges the debt. The tenderer is not bound to take care of the cattle - he may let them go.

But as to small articles and money, tender only discharges the damages, the debt or duty remains - not the same duty or debt - for after the tender the tenderer becomes bailee.

So there is no liability on the note for non-performance. The moment the tenderer brings his money into court - Judgment is in his favor if he has made good tender, and the tenderer has his costs to pay.



The tender is a tender, and is bound to use ordinary care.

In the case of tender it is a general principle that whoever tenders money shall receive the same advantage, as if he had paid it.

On this ground it is that the case of the depreciated annuity is reconcilable.

When a tender is once made it is the duty of the tenderer to have the money ready to pay over when called upon. Not that he will be subjected to an action if he does not, but that the effect of the tender will be destroyed.

1 Brown 411

2 Plow 378

But it is said that the demand of the money ought to be reasonable, i.e. it ought to be made at the tenderer's house.

After tender is made if the tenderer wishes to destroy the effect of the tender, he must make a demand at the house of the tenderer.

At demand their money, which will count to destroy the tender - When the mortgagor tenders money to the mortgagee - tender over - brings the lien.

64 L. 207

64

But in this case he will have to make an  
oath in an adjustment in equity, that he  
has had no use of the money, i.e. the mort-  
gagor. He must account for the use  
of the money.

The absence of a party so that no tender  
could be made, renders a tender unnecessary,  
and all that he has to prove is that he  
was ready to tender at the time and place  
agreed upon.

Tender must be made at the time and place  
agreed upon, and if no place is fixed upon  
it must be made to the person wherever  
he is. - This means that tender must be made  
at the place where he was supposed or pre-  
sumed to be -

If the party has removed and the old place  
has ceased to be his fixed residence, and if  
you know of his removal, you are subject  
to it -

Although as a general rule he is bound to go  
to his place of residence, yet if he finds him



in a different place at the time, tender to him there is good and must be made.

It is said if the Mortgagee claims to tender and goes to some convenient place and notifies the Mortgagee to receive the money there, the tender is good.

In England there are some exceptions to this rule - Tenants are not obliged to go to Landlord's to pay rent - tender on the land is sufficient.

Co. Lit. 210

## Lecture c No 3<sup>rd</sup>

As to the tender of money at all, the rule is different.

If the place be agreed upon by the parties the rule is the same.

But where no place is mentioned the rule is "Delivery at the dwelling house of the creditor".

And if the creditor cannot find it will be no greater detriment to tender at the last place of residence. He is bound to deliver at that place.

If the debt is a pledged note or bill, you

must tender to the assignee if you meet him. C 8  
 - if you do not meet him you must go to the  
 assignee's house and be ready to tender to the  
 assignee, and then it is as a legal tender,  
 you must not pay to the assignee.

After an action is commenced no tender  
 is good as a defence - but if the Def<sup>t</sup> tenders <sup>and. 264</sup>  
 the debt, interest, and cost it will stay the suit.

Suppose the place is agreed on, and the time is  
 the 1<sup>st</sup> of July, or one month after the date when  
 must the tender be made - If the business is  
 to be done at the place on the 1<sup>st</sup> of July,  
 it must then be made - If he is not to be  
 found, the tender is to be made on the last <sup>and. 265</sup>  
 day of the month - The reason is because it  
 is at his election.

So if on or before "such a day" the same principle <sup>and. 266</sup>  
 governs -

If made on the last day it must be on the  
 earliest convenient part of the day. <sup>and. 267</sup>

If money is to be tendered, it must be ten-  
 - dered, so as to be counted by day light and



Feb. 202 20 of leave goods but into the possession of  
the tenderer.

11. 244 244 If tender cannot be made on the latter's  
convenient time, it must be made within the  
hours of business as regulated by custom.

3 Jan. 2. 1893. If A. B. & C. have a joint demand and B. offers  
into one on D, and A offers to pay at both  
the demands, which A refuses, without object-  
ing to the form of tender on account of his  
being entitled only to the joint demand -  
I deny plead this tender in bar of an  
action on the joint demand and he should  
state it as a tender to A. B. & C. -

4 Jan. 2. 194 If A cannot plead non assumpsit as to  
part and tender as to part.

3 Feb. 145. Neither can he plead non assumpsit as to  
counts, and tender as to part.

If no time is fixed the debt is payable on  
demand and in such a case the debtor must  
give notice that at such a particular time  
he will be ready to pay and at such time  
tender will be good unless there be a re-  
newal.

= favorable objection.

64  
604. 211  
504. 98

When no time is specified a tender at any time at the place mentioned is good. - 115  
114

Tender to an officer is good when he is a proper person to receive it. This depends on the circumstances of the case. 115

## Of Pleading a Tender

In pleading a tender the Def<sup>t</sup> must state the day on which the tender was made that it may appear to the court that the tender was made at a proper time.

3d. 164  
1st. 19  
2d. 48.  
2d. 104

The must not only state the day but that it was made at the utmost convenient part of the day. The must state that the

3d. 152  
604. 889  
2d. 634  
904

Plff refused to accept the money - unless indeed he was absent - if the Plff was absent he must state as before, and also that he himself was at the place mentioned, and ready to tender and that no person was there to receive it.

2d. 604  
604. 242  
1st. 114  
1st. 235



10th. 77 If the debt or duty is discharged by the tender  
pleading as before directed is always sufficient.

10th. 149 But if the debt or duty is not discharged by the  
tender, you must say that you are still ready  
to tender and attach the tender in court.

10th. 51 If the debt or duty arose at the time of  
the contract, you must say that you have  
always been ready to tender.

Concerning bulky articles, it is not decided  
whether you may bring them into court, or  
not, to tender. Concerning some of them there  
is no doubt. as cattle - hogs - &c.

Before you come to a plea of tender and found  
against the Plff. the money belongs to the Plff.  
Salk. 537 ... a verdict is given for the defendant.

42 Rep. 144 Defendant cannot plead - non assumpsit as  
or - 194 to fact, and tender as to fact.

3 Wils. 145 Nor can he plead both non assumpsit and  
tender, because the plea would be inconsistent.

Tender operates as a fulfillment of contract.  
 It applies to all actions of a personal nature,  
 and of course to any action of debt and assumpsit,  
 and to an act certain - If he attempts to  
 do it, it is a bar. There is no variation from  
 this principle by the common law. Some States  
 against in different States. Execution is in  
 an agreement to accept something else in  
 satisfaction. Tender of this is a bar.  
 The reason is there is no consideration for  
 such promise. But when it is executed,  
 it is good, for a gratuitous contract executed  
 is binding.

### C. Warre.

Old authorities on this subject are of no valid-  
 ity, they are principally overruled. The  
 old doctrine was, that it is an irrational  
 hypothesis you could set it aside & do it.  
 Modern law is that if by any rational  
 hypothesis you can support it you must.  
 "A war is a judgment by persons chosen  
 by the parties to decide their controversies."



These points are of great importance.

The effect is that it is a bar to the original cause of action, and to the right of action it is the defendant. The judgment of the Supreme Court has no force against it, if it is in accordance with law.

It lays a conclusive obligation to a right of action of the defendant.

It is a much more extensive bar than the former. It is a bar to the defendant, who has not a right of action, it is a complete bar with respect to the right of action. With regard to the right of action, the defendant cannot give a title. There must be a title.

The difference is in this, upon personal assets, it is a bar to the defendant, but in real estate, it is a bar to the plaintiff.

If a bond of arbitration is given, the defendant may have an action on the bond if there is a return to a title.

Deeds are sometimes given to the hands of the arbitrators to be disposed of by the person in whom the power is made. This cannot be done in England, unless it be the intention that

the real estate, as to the nature of the security, in  
future, as to deeds in nature of mortgage. -

Criminal controversies can never be submitted  
to arbitration nor matters of honor.

The private disputes are arbitrable.

How are awards to be enforced? If a sum of  
money is awarded - sett with the other party  
is certain. By taking a bond you get some col-  
lateral security, and you may sue in debt  
on upon the bond.

There has been a dispute upon this point, it  
is said when you have a higher remedy, you  
cannot resort to a less, but a bond is a specialty  
and debt is a simple contract. But when a bond  
is given for the performance of any collateral  
act, and only comes in aid, you have a right  
to either remedy the higher, or the lower. -

This is an important rule - In law you have  
not a power of attaching damages, but ar-  
bitration decide on the specific articles of  
dispute.



If the negotiator cannot be so satisfied as  
to write to a party as one other an action on  
the case for performance or to build a  
house.

They have then all the powers of a court  
of law - indeed they have more for  
the lender's right to require the parties  
unless they are restrained by the subscription.

Various modes to enforce awards

If there is but a bare promise to a bid - the  
remedy for non-compliance, for money  
would be indeterminate in respect of debt.

If only a bare subscription without promise -  
In case of money it would be debt. affump.  
for collateral but action on the case.

The old method was to enter into covenants  
The one now most in use in England is a bond  
to a bid. This is always a remedy.

Another mode is to give notes of land as  
escrows, and this is the usual mode in  
Connecticut, because we consider them as  
Mortgages.

5  
the arbitrators dispose of the notes according to the  
award after indorsement.

There was some other business, but was  
decided to be off.

The parties confer judgments then get out-  
executions and put them for disposal in the  
hands of the arbitrators.

This would be a good mode if ever used  
was of course good, but if it is ever so bad  
the executions have gone out. The courts have  
determined that this proceeding is totally illegal  
and that <sup>to say</sup> property taken on it is a trespass.

The submission is giving power to the arbitrators  
or arbitrator to decide.

Before award you may revoke the powers, but  
if bond is given it may be forfeited.

The powers are revocable - but if they had  
originally considered this as a joint power  
it might have been better to have said they  
have revoked.

All the arbitrators must join in the award.



If a power of attorney is given to two, one  
cannot execute - the rule is general. -

The submission may give a power to left  
hand all to decide.

A practice has been introduced to submit  
to arbitrators and make their submission  
a rule of court. The refusal to submit  
would then be considered a contempt of  
court.

However, a remonstrance, can be made  
when the award is returned to court,  
against it, if it is illegal.

Instead of considering it as a contempt, we  
have given power to the court to issue ex-  
-ecution. -

As principles of English law, award may be set  
aside if it has internal defects. as if it  
includes things illegal - or things unreason-  
able. The court can by forgiving over of  
an action set aside the award for these inter-  
nal defects.

But for extrinsic causes he cannot go to law but  
to Chancery, as for partiality or corruption of -

Lecture March 24<sup>th</sup>

73

I have considered in the former lecture, the nature and force of awards in private controversies generally - that is the manner of appointing Arbitrators, which is by the express agreement of the parties & the manner of their proceeding in trial - the decisive and uncontestable consequence of a good award. The manner of enforcing it. &c

The most usual one that at present is in vogue, the arbitration or submission a rule of court with some regulations by Statute, as that if the award has been illegal, and the party refuses to comply, instead of being committed to prison for contempt of court he may then escape for his noncompliance, and also the court may grant execution instead of committing him.

The submission is not as the parties choose, either written or verbal. if made a rule of court it must be written and signed in court.

The award may be written or verbal at the



The submission is never written.

The condition on terms of the submission must be the rule of the arbitrators. - And they must adhere to the rule of submission in every particular in their award. - It is the duty of the arbitrators, as if they agree that an award shall be written on a particular paper, then the non-compliance will not affect the award. But if they agree that it shall be sealed and sealed it must be sealed.

I will now give you the two ancient & modern, and the authorities.

According to the old law if money was awarded as a debt could be recovered, but if some collateral act as to build a house. The award could not be enforced. - But now the party in whose favour the collateral award is made can have it enforced, & recover the amount of it in damages. -

According to the old law if there was a mutual promise and a collateral act was awarded it could not be enforced nor

and it lay as a foundation for an action -  
 But now the rule is entirely altered it will  
 support an action - At present the Law <sup>1d. Ray. 243</sup>  
 is the same in all cases whether there are <sup>50 L. 122</sup>  
 promises to abide or not. The award can <sup>6 Ann. 85</sup>  
 always be pleaded in bar to the original <sup>2d. Ray. 261</sup>  
 ground of action, or an action may be suppo- <sup>465</sup>  
 -ted on the award if not complied with. <sup>10-1659</sup>  
<sup>10th 70</sup>

If a collateral thing is awarded an action  
 in the case must be brought to enforce or  
 recover damages - whether the submission  
 was by parol or in writing.

A time should be fixed within which the  
 arbitrators must decide. This is a mere  
 arbitrable thing - they may say a reasonable  
 time -

The submission is revocable but if there are  
 two on one side, one cannot revoke for both  
 for they are joint and must coincide in  
 the revocation, but in case of such a vaca-  
 tion the bond is forfeited if any is given.  
 But what is to be done in case the bond



is forfeited by such revocation? Thus suppose a bond is given of \$1000 where the sum in dispute is not more than \$100. will the whole bond be forfeited. There are no authorities reflecting this point. But it has been the practice of our courts to present it all come to, to Chancellor down the bond, so as to give no more than an equitable sum, with reasonable damages and costs if any have accrued. Otherwise it would be the height of folly ever to accept as the bond is a town's worth greater than the sum in dispute.

Sec. 32

In Connecticut if the submission is in writing the revocation must be in writing. According to the ancient law if there was no bond, there could be no revocation; but that has been overruled. And if the submission is oral, and was revoked there could be no damages. but now there can be an action for damages.

4th sec. 32  
62  
270  
2nd part

The bond may be forfeited if the sum is

75  
no recalculation as when the party returns to  
appear, or bring in his account. If nothing  
is wanting but the parties attendance they may  
make an award but in some cases the party may  
insist an award being made. Thus in those  
cases have a dispute about the expenses for  
trip to the West Indies and it went in the  
shape and has all the papers, and with expenses  
more if he refuses to appear and bring in his  
bill, he may prevent the award being made.  
In such cases the rule is that if either party  
refuses the award being made he shall for-  
feit his bond.

We will next enquire who can submit and be  
bound by an award?

All persons can submit who can make and be  
bound by a contract. Fools, Idiots, Lunatics  
and Infants cannot submit: The infants can  
contract for necessities, and will be bound for  
them, yet they cannot submit to arbitration  
according to the common law writers. But  
the arbitration involves a new contract to



will be the infant cannot become a party.  
By <sup>the</sup> law if another was bound to an infant  
if he was not compellable to fulfill, nor liable  
in his bond - Strange doctrine. But now he is  
bound to fulfill. A question can arise  
how is that his assent to give title to land  
when he comes of age, and if he would  
refuse to give title to lands, the bond will  
be forfeited.

Latch. 207  
3 Dec. 17  
Mass. 918

It was formerly said that an administrator  
could not submit - but now the law is entirely  
different he may submit.

2 Dec. 210  
2nd. Dec.  
1 Dec. 1091

Can one of two parties in trade submit and bind  
the other thereby - the subscription must be  
joint.

2 Dec. 228

Has an attorney power to submit to a rule of  
court for his client? he can in court. Can he  
out of court? no - If the attorney signs his  
name as attorney who is liable? The client.

If the attorney signs his name as attorney  
without authority and the client is displeased  
with it the attorney is liable.

2 Dec. 245

9. Exd 25. There is a question of great importance  
stated - where there were a great number of  
claimants to a prize ship <sup>and</sup> the owners, which  
was submitted to arbitration, and two of  
the claimants signed a bond to abide the  
award in the name of the rest, the decision  
was that the owners should pay a large sum to  
the signer of the bond to the benefit of the  
rest. It was contended that the award was  
illegal - that they would not award money  
to one man to pay to a third, but the court  
decided that it was a good award.

Where two submit on one side and two bonds  
are given you can recover your full demand from <sup>one</sup> Exd. 234  
from either but not your full demand from  
each.

A wife cannot submit - but the husband may Exd. 269  
for her and she will be bound, if the property  
is such as he could dispose of. He cannot submit  
respecting real property.  
Proke has a strange doctrine, he says if the wife



not. 600 joins in the submission, he is bound, but his  
cont<sup>249</sup> not so. He cannot submit.  
1000 249

Arbitration generally brings a law suit to the  
it ends the original cause of action.

### Lecture e March 26<sup>th</sup>

All personal matters with respect to contracts  
or torts are arbitrable, except the following  
class of cases. These were formerly considered  
as not subject to arbitration, but by giving  
bond they may be, but you cannot, because  
the bond. It does not destroy the original  
cause of action. The cases are Debt on bond,  
Debt on covenant under seal, and Damages  
by judgment of court.

If there is a condition to the bond, on which  
the bond is defendant, and that is broken,  
it is subject to arbitration, but a new set of  
issues from the court, and it will not discharge  
it. Depends on this principle that a release  
must be given to the person with the contract.  
Covenant under seal, must have release.

Wherever this principle is not binding and  
is good in all cases. 77

In some States it is abolished by Stat. most  
have broken in upon it.

It is said the sum is ascertained by bond  
and of course there is nothing for award to  
operate upon. This is a slender argument &

b. Coke. 43

1 Lev. 292

Crab. 422

Gray. 93

1 Keld. 937

Rule with respect to real property.

The law is that a man may submit a dispute  
on real property, but the award is of no effect,  
without bond, covenant &c on which the  
party may sue. The reason is award gives  
no title. They cannot deliver deeds in Eng.  
as executors. but it may be, and is, done here.  
In Eng. they may give leases for years as executors.  
Difference of opinion on this subject.

If the dispute is concerning land the award  
ought to be, not that the title is in J. Hiles  
but that it be conveyed to him.



lands was always writtble, but the differ-  
ence was to be before the award &  
since the Stat. of Command & the law, a man wont  
surrender a house or title.

Rich. 3. 40.

<sup>2</sup> Who may be arbitrators.

Persons of non sane memory, deaf, and dumb,  
wanting legal discretion, as in case of a minor,  
persons under the dominion or control of either  
of the parties as slaves, and married women  
cannot be arbitrators. If a man will leave  
his dispute to his antagonist, it has been  
decided he is a good arbitrator. There is a  
case where the Attorney general had a dispute  
with the Bishop concerning a demand,  
and agreed to leave it to the Bishop, who  
decided in his own favour - and it was held  
to be good.

Com. back  
713

4mo. 26

Hamp. 43

In arbitrator in the last resort is called  
an umpire. The dispute is sometimes left by  
2ben. 485

The parties to c. & B. Cases if not decided by them  
then to D. Sometimes it is left to the arbitrators  
at a point the umpire if they cannot form  
an award. -

There is a great deal of loose learning and jargon  
on this subject.

Cases where it was left to c. & B. and if they did even 100  
not decide within a limited time then to H. & H.

C. The old idea was that it was a void point. 2 Kintle.  
263  
- 332

Modern opinion is that if the arbitrators  
do not make an award, and cannot, an award  
made by umpire within the limited time is good. Thom. Jones 168

Another question was whether when nomination  
was left to the arbitrators, they could nominate  
until their own time was expired. They finally  
decided they might. It was however held that  
he could not award till the authority of  
the arbitrators was at end. -

Argo. 50  
Gro. 361  
J. H. 250  
1. H. 71  
2. L. 671  
3. Tech. 645

Another question was whether arbitrators being  
nominated one, and he having refused, they could



conclude another

2. Part 113

1. Part 113

at 113 2/2

c After time limited no award can be made without extension of time by the parties, unless left to court.

Common Equity  
2. Part 63.

1. Part 63. The rule was that no award could be made unless both parties were present, or an exception made by the arbitrator may decide on those things that they have proof sufficient to.

1. Part 63  
- 65

Can arbitrators decide part of the controversy, leave the rest to the umpire? Books say they cannot, Practice is entirely different.

Common provision now in the submission, that the umpire may decide upon the whole or remainder.

Haines, 57

The award of two of the three is a good award if the third is waived, and it is so held fairly.

c After award it was a question whether the award

must be notified to the parties? It is said  
in case of bonds given, notice must be given.  
It is now settled that in all cases, bonds  
or bonds, notice must be given.

Common practice in submission to say that  
the award must be given in by such a time.  
Dispute whether it must be in writing or parol.  
It may be by parol.

79  
Hob. 75  
Hob. 160

Another dispute whether on different controversies  
submitted they may award on one, one day, and  
another, another, so that it is within the time  
time. Decided the whole award must be made  
at once.

An arbitrator can never reserve beyond his  
time any thing of a judicial nature, for it  
may entirely change the award.

2 Hob. 214  
Cro. 315  
155  
Hob. 116  
146

The reservation to do a more ministerial act may



be good as in this case concerning land it was  
 awarded to the £10 per acre, and there was  
 not sufficient time before the authority of the  
 arbitrator would expire to measure the  
 land and hence it was awarded to the award  
 that the land should be conveyed such as.

March -  
 43 day -

## Lecture March 27.

It is a rule that the arbitrator cannot dele-  
 gate their authority. They may direct as was  
 shown a ministerial act to be performed by  
 another person as having to do with &c.

2.4.18. 501  
 504

1.16.75

Harwick

181

1.4.558

May 1885  
 1025

You must always award the substance of the  
 thing to be done, the by some other person.

There was a question, whether an award that a  
 fence was good amounted to a determination  
 of its good.

When I say an award is void, I do not always  
 mean that it is totally void, but it may be void

in fact a justice, the best good. Sometimes it  
is not more destroy the whole world.

If a party is willing to submit to an award  
the arbiters in fact it will be good.

First rule is that award must be according to  
submission, to this there are various branches.

1. The award must not extend to things <sup>2nd. 309</sup>  
not within the submission.

Suppose they submit all controversies, an award  
made concerning all the existing disputes is  
good.

But of this has grown a question, whether the  
arbitrators can give an award to show  
upon things not within the dispute, as to  
settle a bond in payment, or any other  
thing not in dispute. Elements & writers  
make it a question. I think, there can be  
none. There is no case which expressly  
that they can, or cannot. Such awards  
have been made and not disputed.

If the arbitrators thing or act is unreasonable



Jan. 22  
L. 100  
1851

Then it could not stand. C and B had a  
contract to let it be arbitrator, and they  
decided that, not to be bound by it, and  
B to dine with him and thus settle it, but  
B did not go to dine, but sued on the ori-  
ginal contract, and the award was found  
- judicially in law. Nothing was objected  
on the ground of its being a collateral act.

Jan. 12

It was decided by arbitrator, that C should  
ask pardon of B. The award to be made as  
set off as unreasonable but not as a  
collateral act.

Arbitrators have a right to award damages,  
penalty, or security for what they award,  
as that the party be directed to give or  
bond or pay by installments.

Nothing which was happened in future  
cannot be submitted but an award may  
sometimes be made on a right to commence  
in future. Thus in a dispute between A and B  
and C concerning a letter it was decided  
that the arbitrator should pay arrears

consent to be so, and afterward \$4.10 8/  
per annum - This involved the question of right.

Arbitrators may dispose of parties' things, if not  
restrained by law, in a dispute between  
them. 136. 2475

If the submission is to decide that dispute &  
all matters of difference between the parties, it  
includes every thing but if that case 298 1115  
every matter in the cause with it it is a 230m 645  
suit one. Decided by Judge Rouse. 300m 626

Before the parties meet at a public house  
and the award is that one of them say the King  
responding. This is subsequent but considered 200m 645  
as cost.

If the award is that after the parties have  
done so and so, then they shall release each other.  
The old rule is that it cannot be done but  
in modern law it can - it is an affidavit.  
The old argument was, if there was a general  
release it might affect things in demands  
subsequent.



new law implies there are no old disputes  
allowed. No advantage can be taken of the  
general release contrary to its meaning.  
In the new dispute may be shown.

Nothing must be awarded to be done to, or  
by, a stranger, according to the old rule.  
This must be taken now with great qualifi-  
cations. I take it to be the modern law.  
That if it can be shown to be a reasonable  
and it is good. Case of Ward upon dispute  
between C & B that and should be conveyed  
to C. There is no reason in it. it is not within  
the rule.

7 Oct. 77

Here is a dispute between C & B, and  
award that B pay to C a credit of £7.  
£20. because a bargain within the knowledge  
of the communicators had been made between  
C & B that what he obtained from his B  
should go to his debt it is good.

£8 123

C and B had given bond to C to pay him  
a certain sum, and there a dispute about

dispositions. award that A pay so much  
and B so much, it is void, although to be  
said to a stranger

Kyo. 105

Bro C. 541  
1 mod. 9.  
1 Salk. 74.

Suppose the award is that something  
be done by a stranger. It is always unreason-  
able. Suppose the award is that A give a  
bond to C, and yet John files to sign it.  
It is void for B cannot make J. Files sign  
it, he has no power.

Particular  
C. 18 I have a controversy and submit it-  
the award is a general release. I must  
be shown that there were other disputes  
existing.

2 mod. 309

Award must be of all things, submit a part  
of a part - This rule must be taken with a flourish.  
So far as the award it must be shown  
not only that the arbitrators did not decide  
on all disputes, but that they refused to when  
said before them. &c.

50th. 98  
Cra. 400

Co. 2858



# Lecture March 28<sup>th</sup>

20th 98  
21st 200  
22nd 175  
1st Mar 271  
Feb 11

There are several actions especially named  
and all placed before the arbitrator, and a  
woman that would is to be made still there;  
then if the award is of part only, it is not good.  
According to the old law.

But the House has submitted that in the dis-  
putes especially named, as a party & house there  
and the like, they could arise upon part, as  
upon the defendant alone according to the  
old rule. But according to reason it is very  
questionable whether if submitted specially  
without a proviso the award on part should  
be good. Thus suppose A have an action  
against B for the horse and B an action  
against A for a horse and B & they agree  
they agree to submit the two cases, now it  
would be unreasonable for the arbitrator  
to say that B should pay A for the horse  
and say nothing about the horse of B.  
This is a rule - that where there is a sub-  
mission between two parties on the one side

and one on the other of all disputes between 83  
them. The award is not to be made dis-  
tributively. Thus suppose A & B agree to  
submit all disputes they have with C, how  
the arbitrator can award on any dis-  
pute between A & C separately from B nor <sup>Ward. 1997</sup>  
of any demands which B has against C <sup>Can. A. 547</sup>  
separate from A.

Thus much as to submission.

An award must not be contrary to law  
it stands on the same footing with contracts  
in this point.

The old rule was that if the parties sub-  
mitted any disputes to arbitration which  
were not actionable the award would be  
void. But the modern law is different -  
tortious lying is not actionable - but if A  
calls B a liar and then agrees to submit it to <sup>1. Sec. 12</sup>  
to say what shall be the damage the <sup>2. Sect 242</sup>  
court will not set it aside.

If an impossible act is awarded to be done  
it is void - they have no right to award



impossibilities. But suppose they award  
that B pay to R \$1000. B is not worth a  
pout - in this case they may award that  
he shall give a bond to pay it in 4 years  
and if he refuses he may be committed to  
prison till he will - all this is good. -

But if physical impossibilities are void.  
Thus suppose the award was that B should  
get four young devils with black heads  
by such a time, and deliver to S. this is  
void of course. -

A contract to be valid must be reasonable  
it also must be awarded. A man award that  
one man shall serve another as a slave is  
void because arbitrators may not prize  
and dishonour of a man's liberty. So also an award  
that C shall get S. Piter to sign a bond  
is void, it may be impossible, therefore unrea-  
sonable. But if the party has a right and  
can compel a third person to perform, he  
must do it. But no real injury must accrue  
to this third person by being compelled.

• An award to pay money in a third person's gift  
house, was formerly held to be void, because  
they had no right to order a man to commit  
fraud. But such award is now held to be  
good, and if the charitable donee will not  
permit them to enter the house he may  
pay the money as well as he can

It used to be said formerly, that if  
a certain sum under seal was submitted,  
they could not award part of it to be paid, tho' 3<sup>rd</sup>  
in this they said was not the thing submitted.  
But now the law is the reverse.

It is also said that a ward must be undemanding,  
that is they cannot demand a better title nor a  
unconsequential thing - as that a man shall  
wash his face or comb his hair.

I question more whether we ought than if I should marry I was a good one - it was said not because not advantageous, the true reason is it is unreasonable.



2d. 292 must be certain.

So where the award was, that A should go to  
Bathurst to do some business, &c., and that he  
should enter into a bond that he would go, but  
did not say how great a bond - this was void.

So also where the award was, that A should  
pay B as much for bushel for wheat, as wheat  
would be sold for - this was held to be void  
for its uncertainty. But if the uncertainty  
can be restored to a certainty by any known  
standard - it is good. So award that A shall  
pay market price for wheat is good award  
although the price may be uncertain at  
present.

Much of the ancient subtlety respecting  
awards is relaxed. If you can ascertain  
the extent of the award, or the intent of the  
arbitrators, you must give it effect if there  
is nothing illegal or unreasonable in it.  
A man owned a wharf, and a spot of land  
adjoining the wharf on one side and a

dwelling house on the other, which he and the  
occupied till he began to have in trouble 85  
but then he grievously vexed and offended  
the owner of the house by building scaffolds  
and piling up boards so as to obstruct his  
ancient lights. They submit the case and  
the award was that the scaffolds should  
be pulled down and the boards removed,  
but they did not say who should do it.  
It was contended that this award was  
void for its uncertainty - even the court  
were divided upon it - but under the 2d Ed. Stat. -  
above rule no such question can arise. - 1076

The old law considered an award as a judg-  
ment to which you could not add, nor di-  
minish from it. The new law is as in con-  
-tracts to be judged according to the meaning  
or intent.

The costs of an award must be appraised upon  
agreement.

An award is not uncertain because it is  
conditional - as if an award is that A. shall



enjoy B's house if he pay £50 per annum  
a.j. 422 This is good for one of the two alternatives  
may be awarded.

2xth. 838 In award may be made with a penalty.  
12 mod. 896

There is no objection to an award because the  
time and place are not fixed. If money or  
goods are awarded and no time fixed they  
are due immediately, a certainty may be had  
by agreement. -  
20th. 612  
12th. 676

But you can't ascertain a certainty by agree-  
ment where no standard is to be had. -  
suppose the award was that A should pay  
as much as was in good conscience due -  
here certainty could not be had by agreement,  
for there is no standard to resort to - and  
the award would be void. -

The old rule was that the award must state  
the particular thing for which the sum awar-  
ded is to be paid - but the present rule is

not so, his presumed the award is for the  
thing submitted.

86  
Hob. 49

The award must be final that is as to the  
original cause of action not an end to suits  
for it generally causes one. If it does not  
settle the original cause of action it is no  
award. Suppose they award that A be  
dismissed in the cause which he has lost  
this does destroy the original cause of action? Comd. 232.  
for he may sue in the next court. Sid. 122

But supposing the award was that there should  
be no more law suits. This would be applied Comd. 33  
only to this case and be final. 2 Do. 461  
1764  
2 Ha. 1024

An award that A should not sue when he  
had sued but had not had his trial. This Com. 110  
destroys the cause of action. 2 Ha. 1082

All awards must be absolute and not taken  
- sent on any condition. Sid. 59  
Com. 456



# Lecture March 29<sup>th</sup>

Copied 15  
16

A further rule mentioned in the books is that the award must be ~~mutual~~ mutual. The reason seems to have been that something must be done on both sides, and releases must be given. Mutualité is conceded by the law even law existing in every case. There is of course no room for the rule. There is no release in the award.

Some qualities of awards.

This is an interesting part - to enquire when awards are made in toto and when in part.

An award to pass in satisfaction of all controversies was according to the old rule. - Modern rule says it means only the controversies submitted.

John 108

If an award is then to settle all controversies up to the time of the award it would not be good according to the old law, the submission

was of all up to the time of submission, not  
to the time of the award. By modern law it  
is good. If release was up to the time of the  
award, by the old law it was bad, they  
say it would release the land of submission.  
Modern law holds it good.

87

The old law originally was that if part was  
void the whole was void. The law was then  
changed to this, that if part was good and  
part void, the good stands in all cases.

Modern law is that an award in part  
void may sometimes stand, and sometimes  
not.

A has a claim against B. A asks it to be satisfied.  
B is ordered to pay it a sum of money, so far  
it is within the submission, but they go on  
further and award him to do something  
illegal, unreasonable, or impossible, does this  
void the whole?

The rule is - If never lies with B to object  
if A is willing to accept of the legal part,  
the satisfaction of all claims - as if arbitrators



awarded a horse to C & T, which is in dispute  
and B having rode the horse, has written  
forward B to pay \$4 per mile. This fact  
is true - but I say I want none of your  
money and am willing to accept of the horse  
only. I cannot object.

C would was that to pay money and give  
a bond and get J. Miles to sign it. B says  
He do nothing about it - but says that I am  
willing to accept of your bond alone.

It would not object. So B is ordered to  
convey land to C and C's wife - B says he  
will not - but if C is willing to have  
it conveyed to himself alone - B must do  
it.

There was a time when arbitrators had no  
authority to award costs - and the arbitra-  
tors did award \$20. damages and \$5.  
costs - the damages if accepted without  
the costs would make a good case -

Suppose the objection comes from C, as in  
the case of J. Miles before cited - is he obliged

13

to take up with the land of B, if that will  
it, Giles agrees to it: The rule is that he 88  
can never object if B is willing to perform  
good as well as land.

Suppose the award thus: B shall convey  
to A land and his wife with the convey-  
ance. B comes forward with his wife's sig-  
nature can it object; no certainly.

Suppose there are a variety of claims  
and arbitrators award in gross, they  
look into book debt, slander, ass. & batt.<sup>4</sup>  
trespass, &c and find a balance in favor  
of A. That is right but if they take in  
matters out of the submission and then  
find for A, it is impossible to make  
this good in any way, it is totally void.

If the complaints are specified as  
book debt, slander, trespass, &c and the  
arbitrators award specifically concerning  
each - but go on to award concerning  
a horse stolen. It is good as to the  
first part of the award. The former  
case alters the result, this does not.



Other offer to do his part - crosses the  
mutuality before spoken of.

There may be difficulty in performing the said  
part owing to immaturity. I should like to  
should say for last week and days week, and  
that B should give it to the others. It is not likely  
to pay the money in full. It is not over the equiv-  
alent, which he cannot as being under him.

1/ If something is intended which is absolute to  
beid, yet if the mutuality is preserved, it  
is good. Thus suppose it is directed to give

Ed. R. 46

Ed. 6

2000.7534

- 639

352

Yeto. 98

2 Jan. 273

1 Ed. 114

B. H. H. in all that he has to do and

B is directed to give a release - here there

lease has no effect if given - and it must

pay \$40.

Great particularity formerly must be ob-  
served in awards but now the substance  
only is required -

May 56

So when a man was directed to deliver up a  
will that the executor might proceed in  
their business and deliver up a copy - this  
was an essential performance, so when a

man who directs it withdrawn his suit, he directs 89  
his attorney to be nonsuited - this is good. 144.365  
C. no. 34

so it is directed to deliver to B. the money  
which he has advanced to C. the delivery  
of the avails of the land is good to C. if  
it is accepted. - J. Reg. 169

So also if it is directed to pay money on demand  
and he pays it before B. has time to sue, it is a  
good performance. - J. Reg. 103

### Remedies

Whether the submission be in writing or not  
there is no dispute but what action will lie to  
recover the unpaid money is a matter  
of dispute. It lies to recover - in which state  
that he had controversy with B. then submit  
to arbitrators - they awarded it to him so  
much - which B. refused to do - but you must  
not state any void part of the award - this  
is for B. to do - but you may state as many  
breaches as there are of the good part and  
recover damages, but you can have no dam-  
ages for the breaches of the void part. If  
a collateral thing is to be done in action



in the case of a bond given action on  
the bond is to be brought.

Secured March 30<sup>th</sup>

If a security is given action is always brought  
upon that, but other methods are given into  
consideration. The consideration of the bond is  
that if arbitrators make an award on the  
premises, and a party refuses to it then it is  
void.

Generally the action is brought on the re-  
last part of the bond - the bond made  
received at large. The def<sup>t</sup> means to dispute  
on a bond is brought, he prays over of  
the bond and sets out the condition of it,  
and then reports in what manner he can.  
he says that no award was made if it  
was, then go - This means either that no  
award was in fact made, or that no legal  
award was made. The Pl<sup>ff</sup> cannot in this  
case answer - he must reply and set out  
the award whether in word or written, he  
states a breach - Subscrip<sup>n</sup> is all stated  
in the praying oyer - then it will appear

on the face of the record whether it is 90  
good or not. The defendant then says as  
I be on record. This can be raised.

Suppose the condition was that it must  
be made at such a time. Then it will  
be brought up as a matter of fact whether  
the record was made before that day.  
If this then can be a demurrer. Suppose  
the defendant in the progress of the time  
that in fact the award was good, may  
he be allowed it after pleading illiberal  
by proving performance, he might 1 Ch. 414  
were it not departure in pleading. 2. 50. 156

The Pff. must set out all the award and  
provisions as to be delivered such a day. So  
according to the old law, if in the submit-  
tion a deed indicated.

prop. 173  
2nd ed. 173

Is the Pff. obliged to state that he has per-  
formed his part? Old rule was that he  
must: but modern law is different: if he  
is to do something before the defendant,  
then he has no claim till he performs his



part of it this must be added.

Wherever the P<sup>l</sup> is ordered to do some-  
thing. There could be no matter whether the  
court or the P<sup>l</sup> must inform and  
decide it, before action.

Suppose declaration is on award, you  
have a right to go over of award, &  
if you find it earlier from one stated  
in the declaration, as to time, sum &c  
you must set out award as it was, and  
demur. If you award as on proof  
it earlier, it is no award. In proof of it  
on bond and on want to deny the sub-  
mission must plead "non est factum"  
and give the particular circumstances  
in this case under the general issue. -

200 153

120 114

123

234

200 307

200 400

It is said that when money is awarded, there  
must be an actual request, but this is incorrect.  
A man is obliged to go and pay it whether  
in a plea or a judgment. The award however may

make it different, so that the D.P. shall rest  
it. 91

The mode of referring a work is that the  
D.P. did not perform either on the other  
side - award or bond.

Ex. 3. 91

There is no stat. or limitation to an action  
banded on an award - either in England, or  
any of the States.

The D.P. does not dispute an award  
made, but that an award is not made at  
all. That is in the submission. He must  
show that there were other disputes sub-  
mitted and shown to be arbitrable and  
not decided.

But if the D.P. states, having paid  
over the bond, the whole award is it in  
fact was - the D.P. manner, and this Ex. 3. 91  
is expeditiously the strength of the award.

No award was ever made - it does not follow  
that D.P. may not recover on bond. D.P.  
may be recovered on. Ex. 3. 91



appointed arbitrators between B & C  
was - B stays away. The arbitrators  
adjourn for next the next week. B  
does not come. They break up. Can  
C recover? No - Unless they should  
have decided on expert hearing. Is the  
fault of arbitrators. But if C has evi-  
dence of the claim, and does not come  
so that award cannot be made. C may  
recover. -

Inst. 81

Arbitrators find that cannot make an  
award within limited time - They must find  
it by consent of the parties, and it is  
then made and not performed. Can  
award be made on the basis not at hand  
to him. It cannot by a later decision.

Inst. 82

It is possible to make a rule of court, may  
bring in motion on award, be judgment,  
Inst. 100 but not a law book -

Lecture: March 31<sup>st</sup>

92

Granting an attachment for contempt is not  
a matter of course - In discretionary with 2 Hen. 695  
the court.

So if it seems a hard case upon the man.

1 Hen. 278

Where the award is to a collateral act  
chancery will sometimes grant a specific  
performance, and sometimes not.

3 R. W. 210

189

Where it is made a rule of the court of equity  
it will always grant a specific performance.

A man was ordered to raise, and pay over  
\$100, and the other to grant land - the money  
was raised and paid, and upon refusal  
chancery would decree the land to be granted.

Where it has been executed on one part <sup>3. Report in</sup> equity will decree specific performance. <sub>Chanc. 2103</sub>

An award was to pay 500 and receive a  
conveyance of property - the award was  
defective - the party asked if he must  
be abide - he said he did and land was



20m. 24

would to raise the money. The other then  
refused to convey property. Chancery decreed  
it.  
I said that a bill should have to bother  
a certain sum, and that he should convey,  
he paid the first installment, and then  
demanded conveyance - refused. Chancery

22m. 187 decreed it.

10m. 24

The mode of obtaining relief in court of  
law may be as before - but if the award  
is bad from extrinsic causes it may be  
set aside if it has been made a rule of  
court - not otherwise. But you must  
then apply for relief to Chancery. In  
this State the rule is different.

20m. 815

147

3e 14. 529

The time to set aside in law is limited,  
you must apply to Chancery. For an ex-  
trinsic defect, the bill may be filed against  
arbitrators as well as party to make them  
pay costs.

2e 14. 396

Causes of settling with awards.

43

Case improper bias, or partiality with respect  
aside award. 24 Nov. 515.

(A. B. where arbitrator<sup>th</sup> had private relations  
with one of the parties, and heard ex parte  
evidence - was set aside -

It appears was brought up for review in the last  
report, arbitrators not agreeing, it was set  
aside for impropriety. 24 Nov. 485

Case B left to C & D to decide and they did not  
then to E. they did not and of course left it  
to E umpire - After he was chosen a report  
said that E his master intended to give B  
£1500, and it turning out so, and this sum  
being great, and disproportionate, the award  
was set aside. 24 Nov. 161.

2--- 251

Case where one of the parties desired them  
to postpone settling the award, as he was  
sick - they acceded but immediately  
made an award, it was set aside. -



There was a long account between C & B. C & B  
were going back into all the account. C  
contended there ought not to, and requested  
time to prepare - Arbitrator made an  
3 P. 312 award was set aside -

Before the case was heard one of the arbitrators  
said he meant to make the party pay  
2 P. 316 costs at least - Award

He said he cared not about fact, but he  
believed one had abused the other &c - Award  
2 - 216

Insulated case - Arbitrators had made an award  
and their own fees - but were apprehensive  
that the party against whom was the  
award would not pay fees - therefore said  
each should pay three guineas, and award  
should not be given till the money was  
paid - In suspecting it to be against him  
2 P. 317 Bernardston refused - the other paid the whole six  
- 483 guineas - award was held bad -

man had a dispute concerning a charge of great value - if the charge was disputed & if he could pay his debts otherwise was bankrupt. The arbitrators were all creditors, who decided by 10/11. Then immediately brought a writ of replevin attachment to secure the property which was in Det<sup>ts</sup> hands. These circumstances taken together set aside the award. - 2 Vern. 157  
Or. 150

An award may be set aside for unfair conduct in the parties as if a man conceals that in his pocket which if known would have varied the award - will be set aside. 1 Atk. 77

So legal objections are sufficient to set aside an award - Amb. 245

Where it appears upon the face of the award the arbitrators have made a mistake in their own principles as in calculation - is void. 3 Atk. 497  
2 Vent. 151

What is pleadable in law

It can't be plead in law to action in which title of land is concerned, as in ejectment.



It is not pleadable in bar to a bond or other sealed instrument - when the debt grows from the bond itself. because award is not of so high a nature as a bond &c. - not law here -

When award is pleadable it is pleadable without performance. -

Old rule was - If award created a new duty and extinguished the old - can be plead in bar - If it is not extinguished - cannot. This rule is now exploded. -

Sometimes a man may plead in bar an award to which he was not a party - as A brings an action against B for the pasture of B's horse which has got into C's lot - Arbit<sup>rs</sup> decide C pay B - £ 1. then after payment brings an action against C for the same act. but he can't have but one remedy - therefore may be plead in bar. -

1 Roll. 268

A stolen man engaged in battery upon A. he brings the matter before arbitrators

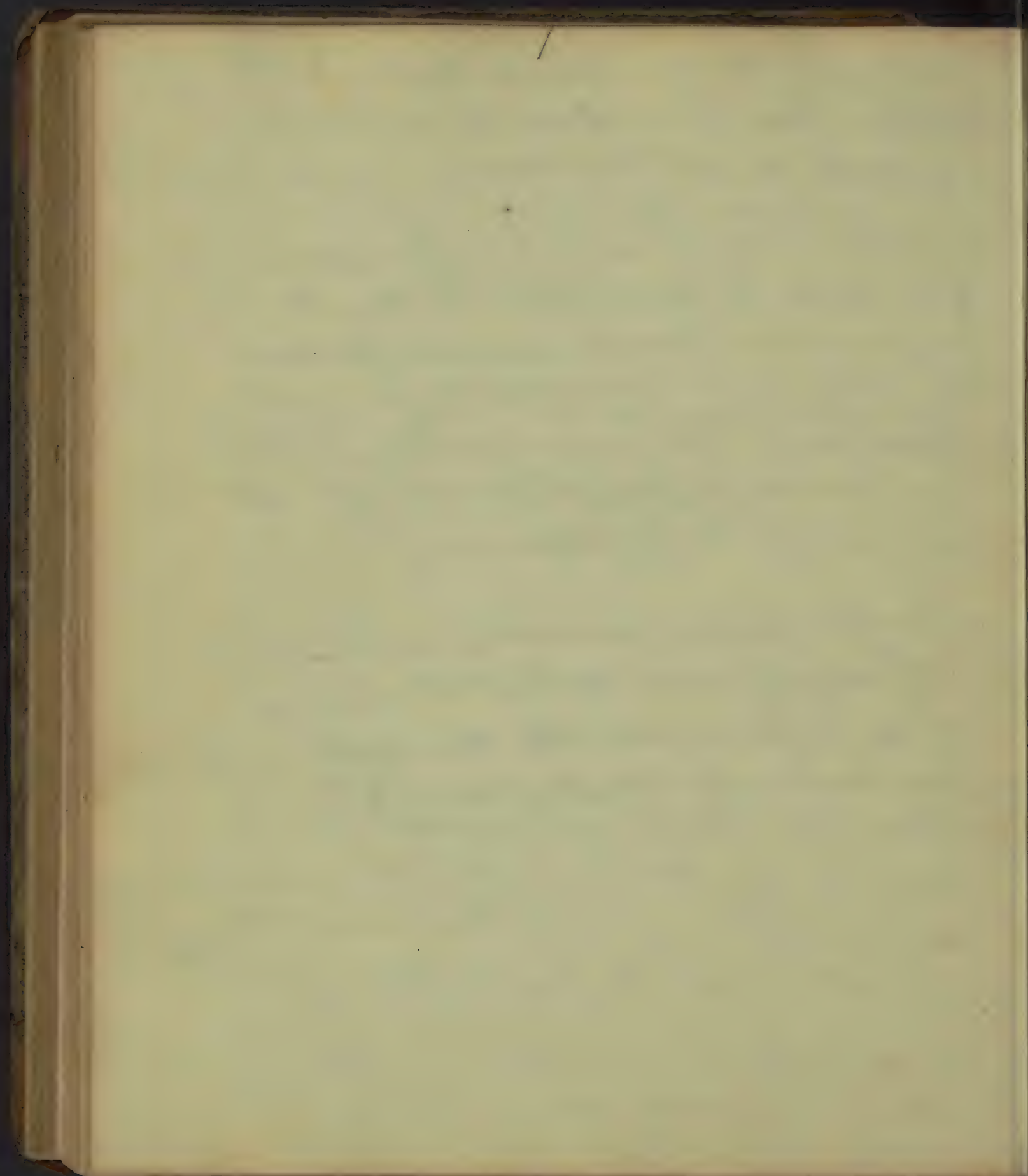
as it respects B. Each is liable for the  
whole - B is to pay \$100. the others can  
plead this in bar to actions. - Com R. 328

Rule

Suppose submission last Term and award  
to be made to day - before the day a  
long action in court - can submission be  
brought in here - Old rule it could - but I  
apprehend this is a revocation. No there  
is no decision to support my opinion. the  
bond would be forfeited.

Another rule, if award was not complied  
with might resort to original cause of  
action - this is entirely done away - Ky R. 250.  
he is liable for breach of award -





# Accord and Satisfaction

Lecture April 2<sup>nd</sup>

Accord is where one is under obligation to do or pay something to another - and they agree to do another thing in lieu - as for ex. money to receive iron in pay. -

Accord is always pleadable in bar to action, where damages are to be recovered whether certain or uncertain - therefore to all actions founded on torts - as account, abatement, breach of covenant &c.

What cases is it not pleadable in bar to?

It never can be to an action of debt, when the debt grows from the deed itself. But if there is a bond under some collateral condition annexed on which the bond is dependant - the debt will be pleadable. -

The old maxim comes in force because accord



is not of so high a value as a written instrument.  
By common law payment of money on bond  
should not discharge it.

1000/1000  
134. This principle in law is that is known as the  
rule 110. An accord is a good plea to a bond  
110/1000  
134. 18.  
134. 44.  
134. 100.  
134. 266.

When there are more Plffs than one, accord to  
one is a plea to all, because it operates as  
payment.

134. 79 With regard to real estate accord is nothing  
it can't convey for conveyance must be by deed.  
Qualities of an accord.

1<sup>st</sup> It must be in full satisfaction.

2<sup>d</sup> It must be certain.

3<sup>d</sup> It must be executed.

It must appear there was some consideration  
- no matter how little. If none it appears there  
was none - it is void as other contracts.

A brings action against B for a forcible entry  
into his house and taking goods. B pleads  
accord was that C A should receive and

have the deeds again - <sup>97</sup> Here there is no con-  
- sideration. How. 5

1 Roll. 123

4 Mar. 58.

Case where a man owed another £15 and  
a record was that £5 should be received,  
here there was no consideration -

Must be a consideration in point of law. - 2 Wob. 56

Record to receive fifty pounds of iron for £60  
of money - is good -

Record to receive a house from which he  
had been forcibly removed, and the other  
to facilitate the entrance by act of his  
own - is good.

Record must be in its nature pecuniary -  
the not actually money.

A and B had a quarrel, A asks pardon  
B accepts it, then brings action - quare can



1 Oct. 129

The condition be plead as good accord? No  
- but it ought to be

It must be certain.

It must be certain at the time  
and such as would lay the foundation for  
an action. - It could was to relinquish  
a house - here no time is specified, accor-  
ding to the old rule had. not so now.

It was agreed to deliver a quantity of wheat  
totally uncertain.

2 Oct. 125

14 mod. 88

It must be executed.

Suppose one says another £50  
he tells him he wishes to pay in iron, the  
man tells him he will accept it he comes  
with the iron, and then the other refuses,  
his agreement can never be plead in bar.  
I have no doubt it lays a foundation for an  
action.

The Statute will answer in this contract. It  
is the only one where Statute will not answer.

Had last of the man seen a vessel it would  
not have destroyed the original cause of action.

1 R. 11. 124  
6 R. 11. 124  
315

1 mod. 167

An accord to do some thing hereafter, is not  
a good plea to an action, brought before  
the time of execution.

1 R. 11. 124

An accord then is only the delivery and  
caption of something collateral in satisfaction  
of the same.

9 R. 79  
180

1 R. 11. 124

## Injury.

This is defence to all <sup>contracts</sup> ~~actions~~ except for  
non liquet. If a bond is given for necessaries  
it can't be recovered on. because the con-  
sideration cannot be enquired into.

When a man comes of age, and then  
agrees to fulfil his infant contract, he  
is bound by the original contract.



(Respect to torts.)

In case of trespass in larceny is no defence at all. There is no will requisite in trespass of larceny, and a man 14 or 15 may commit trespass, and be liable if they rob the property.

In case of slander when is a minor "doti capax" at 14 males - 12 females. There are no cases under 17 but this leaves nothing.

## Coverture

Defence generally in all contracts. With respect to personal contracts. The law has in some measure been altered, so as to make them liable in some cases.

She can convey her land with her husband.

Coverture defence to tort? If her husband is with her his good defence. So also if it is done by his command. Cant in these cases

ingue. The wife. Different from the women 49  
usually as respects the matter and breast. They  
can be united, in action on foot.



# Statute of Limitations

Lecture April 3<sup>rd</sup>.

This is a difficult subject it has been supposed that the decisions are contradictory. But there is actually no contradiction in the authorities. There are 2 or 3 theories why statute statute of limitations is a bar as there are contradictions only one can be right. We do not find in English books the Stat of lim<sup>s</sup> operating so extensively as in most of the States. Operates more particularly on all kinds of assumpsits. The time of the Stat. has expired it does not follow that the contract is not good. It may be taken out of the Stat. by some subsequent transaction, as a new promise. 1<sup>st</sup> One old idea referred to above, concerning taking out of Stat. is this that length of time always creates a presumption of payment. That this time runs uncertain, but that Legislature have reduced an uncertainty to a certainty. That is have decided when this

presumption arises - but that whatever will  
 remove this presumption <sup>will take it out of the</sup> - this is a plain  
 rule the prothesis but as I apprehend can  
 not be correct - some cases seem to sup-  
 port it. Miles owes a note for a horse after  
 7 years he comes and demands the money  
 Miles says I know I owe you and will pay  
 you - This takes it out of the Statute.  
 Suppose he says I have not the money  
 now but will, and does pay part. takes it  
 out of the Statute. from these principles  
 it follows that if you can once fix the  
 indebtedness, the law fixes & raises the  
 promise, This would do & claimed at B  
 that he owed him a sum of money & he  
 acknowledged it & said the Stat. had  
 run against it - here indebtedness was ac-  
 knowledged, but the money could not be  
 recovered. - Another case - Miles calls for  
 a debt of nine pounds - Hoker does not  
 deny the debt but says that Stat. has  
 run against it - but as he don't want to  
 cheat him, he will pay him £5 as much  
 as he ought to have. Miles says on this.



or it <sup>is</sup> - can't recover - but could recover  
the five pounds.

Now in Chancery under the joint estate man  
makes a will and directs all his debts to  
be paid - than? will direct debts barred  
in Stat. to be paid as well as others, but  
stands if they have been presumed to have  
been paid - they ought not to be paid  
again. This proves the incorrectness of the  
idea just mentioned.

So also in Courts of law. it has been de-  
termined that if a man becomes a  
bankrupt and takes advantage of the  
bankrupt laws and afterwards becoming  
rich publishes in the Gazette that he  
will pay all his debts - it embraces  
debts barred by Stat. as well as others.

2nd & another hypothesis does not suppose  
a presumption but a debt bound in good  
conscience to be paid. therefore when a  
man makes a subsequent promise, this  
together with the prior moral obligation  
takes it out of the Stat.

101  
This was a correct view of the subject.  
The action would always be brought upon  
the last promise, and the former signi-  
-fication would be set up as the consideration.  
But this is not the method - The it is  
difficult to decide whether in action  
of indeb. ass. it is brought on the origi-  
-nal contract or subsequent promises.

One man owed another a sum of money  
and died - debt was barred by Stat. c 1  
The <sup>creditor</sup> ~~deft~~ went to the executor, who informed  
him of the existence of the debt - Exec.  
said he knew nothing about it, but if  
he would prove it, it should be paid  
c 1. did prove it - it was not paid -  
action was brought against Executor -  
sustained but had it been paid  
-d on the subsequent promise it could  
not have been brought against the es-  
-tate of the testator.

Late case. c 1 man called for money  
owed, and barred by Stat. The was refused



to me the letter that he might be dis-  
-graced by pleading that to a just debt.  
he did owe previous to trial the deft  
will I am not such a coward as to  
refuse payment. I will say it, is a just  
debt - This was offered in evidence as the  
fact proceeded, and was admitted.

The true rule is this, There is no pre-  
-sumption of payment, but it is a positive  
law out of policy to settle disputes made  
for the debt. But if the debtor does not  
choose to take advantage of it, he may  
waive his Statute by promise or any  
act amounting to a waiver, and is then  
liable. By waiver the old original contract  
is revived and good... This will be found  
a correct rule if you compare it with  
the cases before cited.

According to common law the Stat. must  
be pleaded - if Deft offers any other plea  
he waives the Statute.

A creditor petitioned that a bankrupt  
might be declared bankrupt if he was

from the creditors, and found to have  
 this bankruptcy set aside, because the  
 petitioning creditor's debt was barred by  
 Stat. of Limitations. Court decided that  
 Debtors had waived this.

The endorsement does not take a note out of  
 the Statute, that is unless it can be pro-  
 ved that the endorsement was actually  
 made with the knowledge of the Debtor.  
 Upon note - bank left barred by Statute,  
 and a subsequent promiss. it has been  
 held by last decisions in Superior Court -  
 an Supreme court of Error to be taken out  
 of Statute - also in the National courts.  
 There has been a great dispute concerning  
 this subject.

2 Burr. 1009  
 Pre. Chanc.  
 1852 385  
 6 Rob. 41  
 5 mod 426  
 2 Auth 471  
 2 Vent. 752  
 1 Salk. 29  
 10 Vent. 191  
 6 Rob. 160  
 — 381  
 5 Burr.  
 — 2628

### Lecture April 4th

As to the time when the Statute begins to  
 run if nothing is said it begins from the  
 date of the instrument but sometimes



thing said in that it will begin from  
the time the right of action accrues.

Sec. 134  
Div. 43

However there is no limitation to bring  
the Statute runs - Except promises are  
limited by Stat. to three years

There have been modifications of the Statute  
made by Courts of Justice as if a man  
has his judgment, which is set aside for  
infirmity - and in mean time time expires,  
it shall have a year after. So also  
Executors and administrators are entitled  
to a year.

But some Court shall not be injured if  
her husband does not join with her  
so that she can bring her action. So of  
infants - The action must be brought  
within five years after the disability is re-  
-moved - But in those the Stat. seems  
to run before the disability - Rule is  
that intervening disability will not  
prevent the Stat. running.

The Statute is proved upon the ground  
that no action is to be brought on it,  
within the limited time. The Statute  
is generally plead in bar. The courts  
have always gone upon this principle  
but I apprehend the proper way is  
always to plead it in abatement.

Suppose a bond is given in State S.N.Y.  
where there is no Statute limitation con-  
cerning bonds and is sued in this State -  
as that State in bar can this be a limitation  
of suit in New York. No thought need be  
of the bond should be subjected to the  
laws of the State where it was made.  
But if it is plead in bar it goes to the  
action. Therefore should be plead in  
abatement.

Limitation for actions founded in torts.

No such thing as taking this out of  
the Statute. The Defendant must receive it or  
as to enable the Pfty to recover in a  
court of Justice. There is only one way



in which it can at all be received, viz  
by Intestment or Relinquishment.

Suppose a man is landless and the  
intestment is creeping round to three  
years and he not know it, it would  
seem reasonable that he should not  
be barred. but the general inconvenience  
would more than balance it.

Limit be little to lands.

Title is not affected in any State but  
this by Stat. of Limit.<sup>ns</sup> When Stat. of  
England speaks of 20 years it means  
only that the right of entry shall be  
taken away - that the title is not affected;  
he may buy it. Some Stat. in 15 years  
takes away title and possession. We don't  
separate title from possession, any more  
we read than business things - that is  
legal possession. Notes when title's land  
cut into timber - title may being trespass

5

no it may never have seen the land. — 104

## Duress

This is a good defence to contracts in all cases. A contract ever so righteous obtained by duress, will be voided. &c

## Want of Sound Understanding.

In Connecticut we have a different rule from the common law - viz that Lunacy is a good plea in bar in a court of Law. by common law must apply to Lunacy - -

## Folly.

## Foreign Attachment.

This defence was unknown to the common-law except by the custom of London. The law on this subject depends on the



States of each particular State.

Defence is in this way that by writ of foreign attachment the Dep<sup>t</sup> has paid the debt of his, to the P<sup>l</sup>'s creditors in satisfaction of the original contract.

Suppose Vokes owes Stiles \$1000, and Vokes absconds leaving property in the hands of White - Stiles gets a writ for Vokes but knows of no Vokes having \$1000 of Vokes property in his hands, Stiles gets a writ of foreign attachment for Vokes, and leaves a copy with White charging him as being factor, agent, or trustee for Vokes, or as one who factorizes him. Then if judgment is rendered against the absconding Debtor and the garnishee refuses to pay the money - a scire facias will issue against him, and bring him to court, and put him under oath concerning the property he has of Vokes. But suppose the P<sup>l</sup> says I don't want his oath, I

can prove it by other witnesses. But while  
it must be allowed to testify, he is com-  
petent witness, the other testimony will  
also be admitted.

The rule is, that the garnishee is  
never to be put in a worse situation  
than he would have been, had his cred-  
itor not run away. except the trouble  
of proving that he was factored, and  
did pay his debt, which is to be done if sued  
by the creditor. If he is to pay a debt for  
his own collateral article as boots, shoes, he  
cant be compelled to pay the money if  
factored. The writ of foreign attach-  
ment cant issue for torts, as whipping,  
slander &c but may upon judgments  
for torts if they become debts, and  
you cant sue for any thing but debts. -



## Lecture April 5<sup>th</sup>

### Composition with Creditors.

A man who is a bankrupt may make a composition with his creditors, that is may say 5<sup>th</sup> p<sup>er</sup> pound, & this is good but - if one agreement is entered into by one creditor different from others, it is void. As if A. B. C. & D meet and agree to accept 10 per cent, D agrees, but receives secretly for his compensation a note to full amount - it is void, on the ground that it defrauds other creditors.

### Illegality of any kind. -

If there is any illegality in a contract, no matter from what it arises it is always a good defence. The only difficulty is to get at it. If the whole contract is set forth, it will appear on the face of it.

whether it is illegal or not, but in the  
case of a bond it is difficult to come at  
the consideration, as it can't be set-  
tled either by P. or D. L.

106

But you may always attack the con-  
sideration of it and prove its illegality <sup>3 Wils. 341.</sup>  
if it does not appear on the face of it. <sup>2d - 347</sup>

I was with the greatest reluctance the  
court adopted this practice, yet it never  
was doubted, but that rumour might  
be pleaded. Tho the general doctrine  
on which it was founded was denied  
to be law. -

## Fully accounted.

Parties usually sign a writing of  
settlement.

## Merge

That there is a bond when a  
sum is brought. In some cases  
where the bond is only a collateral  
security, it can't be pleaded in bar.



But in case for example of a sum  
of money due, and a bond given, it  
can be held to be in bar to action for  
the money. —

### Former judgment.

It must be a judgment on the merits.  
not for mere informality as defect in  
the declaration. When in original action  
there is not substance for the declaration  
it is in bar to the merits, and will be  
a bar. You can't shift the form of the  
action and bring another. as in case  
of the concurrent actions of trover, and  
perhaps, you can't bring one after the  
other.

The general rule and criterion is. If you  
are obliged in the second action to  
bring the same kind of evidence to  
support it as in the first, the first is  
always a bar. —

## Discharge - Technically.

This means - Persons throwing up a bargain before right of action has accrued. But suppose they don't throw up the bargain till after right of action - this is no avail - there must in such case be a release.

606.384.

1 Sid. 177.

293.

Release is discharge after right of action has accrued.

2 mod. 44.

1 mod. 205.

## Payment.

In common law this could not be pleaded to bond, it may now by Statute. Must be in kind, else accord must be pleaded.

If you are sued upon covenants, plead generally that you have kept your covenants. When bond is given to save him in law, and sued upon, may plead - "non damnificatus".

If contract involves principles of law the "quo modo" must be set out; but if



more matter of fact, it may be said, than  
that he has performed.

## Release.

A parcel release attended with consid-  
eration is commonly called a discharge.  
I prefer now to release in writing. it  
need not be sealed. There must appear  
a consideration in the writing, otherwise  
it is a mere nude fact.

If sealed you need not state the con-  
sideration. The difference lies in this,  
that the seal itself implies a consideration.  
Suppose the instrument states all  
the consideration, and this appears in fact  
to be no good consideration. Would it  
be good? No, it would not. The law  
only considers the seal as furnishing  
presumption that there is a good con-  
sideration. But this removes the pre-  
sumption. The best and most com-  
prehensive words in a release are "all  
demands and all claims".

17  
There is a debt not due at the time of 178  
the release Does it discharge third? - vol. 291  
does. Prof. 301

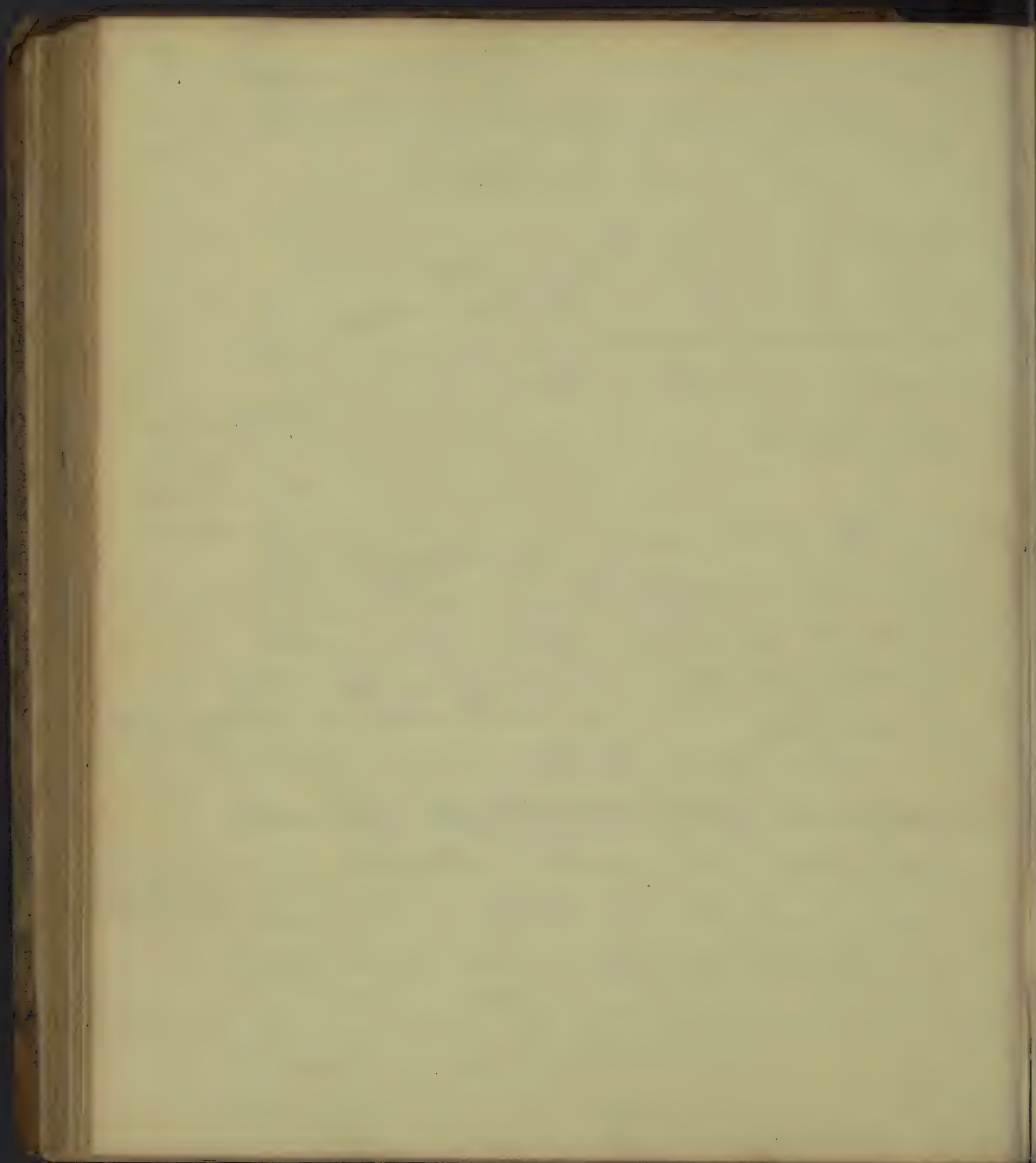
Suppose a man leases a farm with  
£100 rent per ann. Does a release of  
all claims include rent-to grow after-  
wards? No - because the enforcement cu = vol. 606  
= takes the rent. Prof. 487  
Vol. 141  
Talk. 575

c Another set on which release will not  
operate the covenants not broken. as  
covenants to repair house - it is not  
discharged. There is nothing in cpe to be  
discharged. Prof. 171

But discharge of all covenants will reach  
here

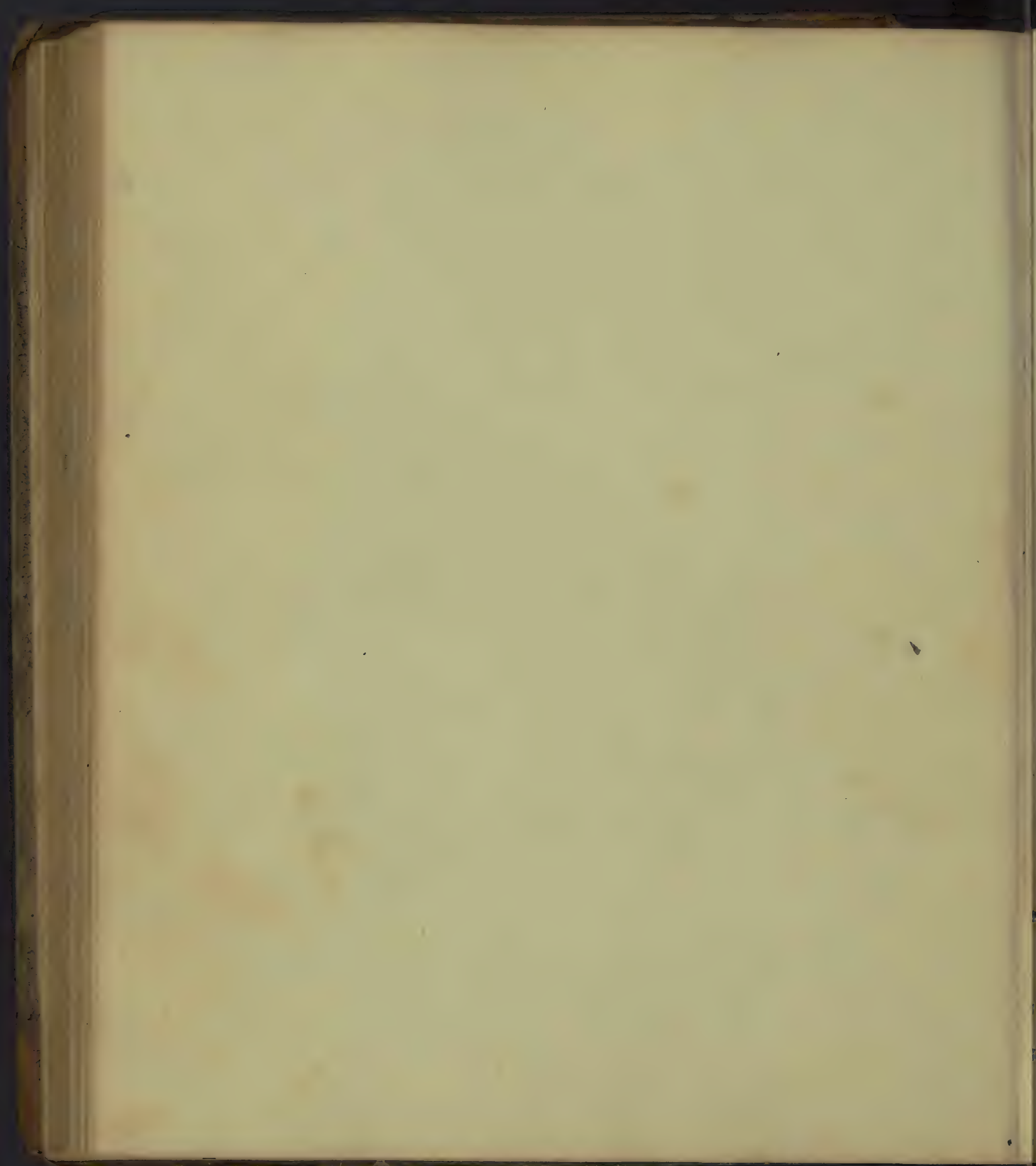
Prof. 170  
vol. 292





109





110

# Lecture March 22<sup>nd</sup> 1874 On Notice and Request

It is common law a request by the Plaintiff is necessary in all actions on contract. The rule is, <sup>14 Me. 92</sup> <sup>10. 20. 38</sup> it must be by writ the usual form is "The Plaintiff requested and demanded" <sup>3 Salk. 308.</sup>

It is sometimes necessary to give notice of fact the notice is not always necessary - <sup>10. 51</sup> notice the rule is that it is always necessary to give notice to the Defendant where it is necessary to complete the cause of action. Where <sup>10. 463</sup> the fact on which the Plaintiff's demand is founded is as to the parties in the Plaintiff's knowledge he must give notice to the Defendant <sup>10. 463</sup>

It is not a debt which will not be supported on demurrer. If A. purchase wheat of B. at the highest price that it shall bear within six months - The Promise is supposed to know the price and must state it to the Defendant before his action and make it appear in his declaration. But the rule is different if the source of information is equal to both <sup>10. 463</sup> - If A. promises to pay B. a sum <sup>10. 463</sup>



Com. Dig. of money or in a marriage. B must  
inform A of the happening of the event.  
Lith. 158 If A promises to take in the Promisee's  
children till age - notice must be given.

1. 2. 17. If A promises B to take him a certain sum  
Lith. C. 75 on the day of his marriage with AB. The  
Promisee must have in the form of information  
If one promises to deliver another a certain sum  
Lith. 247 it is a promise to deliver a certain sum.  
C. 156 Promisee must give notice whether he does or  
- prove or not.

1. 2. 4462 In a Contract to account before Justices  
Lith. 4462 or the Promisee shall appoint they  
must give notice that A. B. & C. have actually  
been assigned.

Com. Dig. But it is said in the books that if the Prom.  
Lith. C. 75 in contracts of this kind a certain sum when  
Lith. 102 the Promisee performs a certain act there is  
Lith. 228 no need of notice - I doubt this rule it  
Lith. 405 is given as an example that the Promisee  
Lith. 145 is to perform when the Promisee returns  
Lith. 68 to London - he may come & see the  
Lith. 44 if one promises to take a sum - Promisee's  
doing a certain act to a stranger is a gift.

no need of giving notice. Either party may sue  
the stranger for information. —

111  
C. 15  
L. 102  
243  
405

When it is necessary to give notice it must  
be given within the time required by the contract, otherwise it will not avail —

Roll 469  
L. 2  
Plad. 674

If one contracts to do an act or the performance  
of another act by a stranger, it is not necessary  
to give notice. The fact is equally within the  
knowledge of both.

Roll 462  
L. 9  
Hot. 14  
L. 114  
271  
315

If A promises to B to pay or to perform on  
B's files & turn into the realm. It is not necessary  
to give notice. So if A promises to pay B,  
within a certain time, & from it J. Files was  
not paid. It is true if the promise is to pay  
such a sum as J. Files shall direct or to pay  
a bill of cost which shall be adopted.

Comp. 411  
L. 9  
C. 75  
L. 412  
L. 414  
Roll 92  
4 mo. 230  
L. 144

Request

The request to request — in some cases the  
must have a special request. If the defendant  
engages to do a collateral act on request,  
there must be a special request — and it must  
be in the form — If I agree to do this, my promise

111  
L. 11  
L. 11  
L. 66  
L. 55



6. If I hire on request. he cannot maintain  
an action till request is actually made.

6. If one promises to pay a collateral sum on  
request. special request is necessary. c. 1

3 Inst. 318  
collateral sum I take to mean a sum not  
due by promise but by a stranger but -  
which he assumes

1. 2. 114-  
an. 6. 69  
inst. 83  
54  
71  
If one promises to pay on request such a  
sum as the Promisee shall expend for his  
use - There must be a special request.

There is no definite rule in the books on the  
subject but examples illustrate. I have thought  
there might be this general rule - That  
whenever the request forms part of the con-  
sideration of the promise and is thus a part  
of the quid of the action, it is necessary there  
should be a special request, but on the  
contrary not necessarily. examp. c. 1 promises  
to pay a collateral sum on request. the  
request is a part of the consideration of  
the contract. This a conditional contract.  
This rule of course does not refer to lands  
and collateral acts. Where request is a quid,  
necessary.

9  
e. An action must be not necessary when the duty is  
not duty, is precedent independent of the 3 Jalk 308  
cont. Act. Because the request is not the 3 Jalk 200  
ground of action or the consideration - as Salk 98  
In the case of a common note it is pre-  
-posed there is an indebtedness, and re- 3 Jalk 308  
-quest is not necessary. In these cases the al- 7. 153  
-location in the declaration "tho often requested" Com. D. 10  
is sufficient. The last rule must be un- C. 69-  
-derstood to mean that the duty is not  
-varied.

7. I concur that before the claim can be set Com. D. 10  
before final timber. It is necessary that timber  
be actually demanded.

Then a special request is necessary - time 6 re 7. 153  
and place must be averred - because the 6 re 8. 85-  
request being important it is usual. This 6 re 2. 104  
is never done in bills of exchange. = C. 69 -

This is not necessary where the general plea  
involves a denial of the request - but in actions



Bro 2.35 - I want it - it is - otherwise -

Ann. 2. 1874  
E. 69  
Bro 8. 74  
55  
Bro 9. 1873  
2. Sub. 249  
Intra  
10 ay. 1873.

The case in *Day* in relation to established  
principles, is not law the judges all being  
having been engaged in it - it has since been  
overruled -

Ch. 18308

1873  
Bro 3. 74  
3. 18308

When there is a special request the government  
is reasonable when it is not special it  
cannot be traversed.

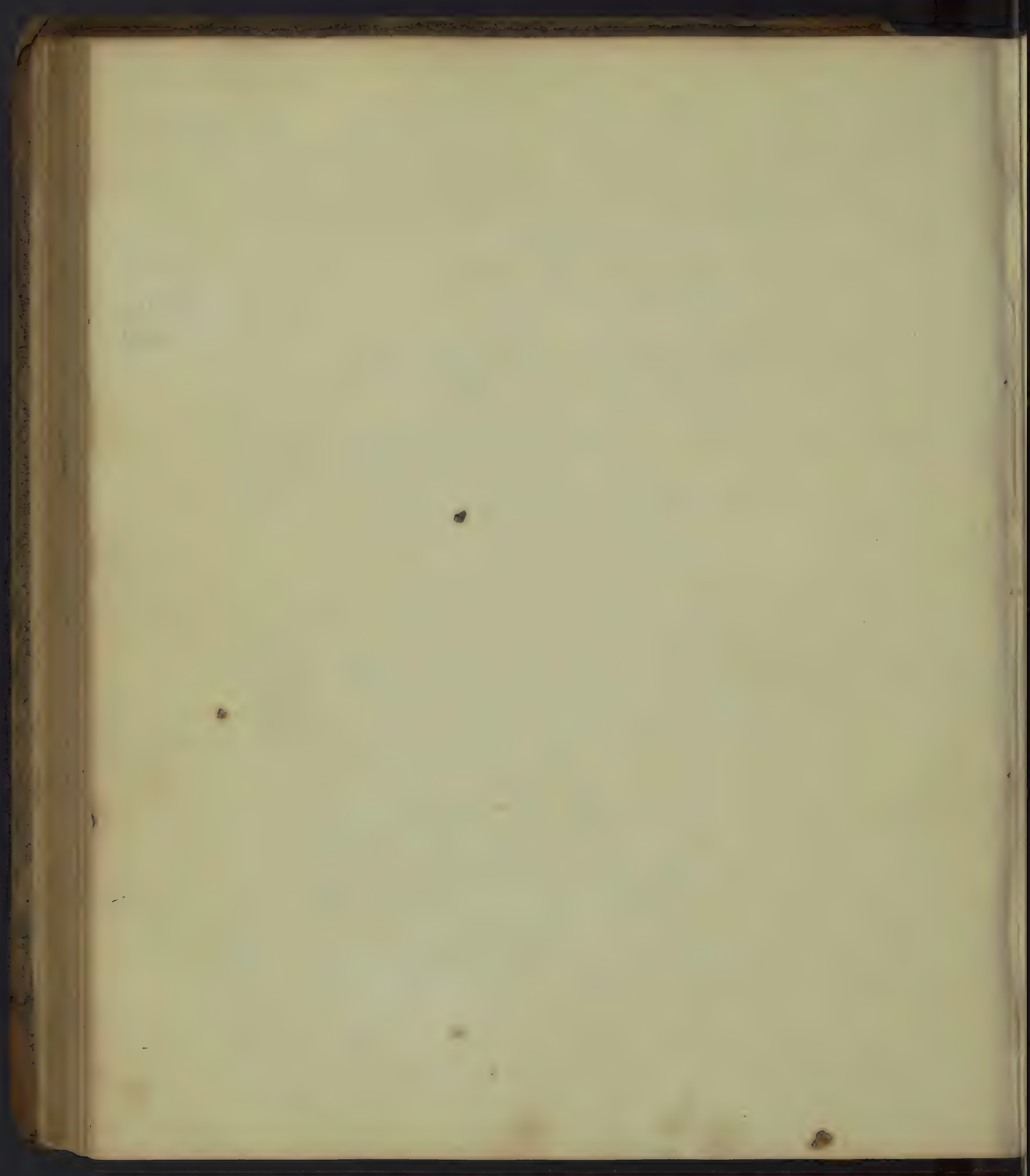
It is a general rule that when there is a  
contract to perform any thing on request -  
and the Govt. cannot discharge himself  
by tender - a special request is necessary.

If one presents a bill to be paid  
by Banker at a Store - presentment at -

The Stone is now broken.

113  
Trans. 1195  
Shelly 134.





# Private Wrongs.

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Lecture April 6<sup>th</sup>

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## Slander.

I shall treat of Slander by words.  
Slander is of two kinds words actionable in themselves, and words not actionable in themselves, but by reason of some special damage. This distinction is important for if the words are in themselves actionable the party need not prove any special damage. To constitute Slander of either kind the words spoken must be malicious and false. By malicious is not meant, it is with malice, but every thing said or done with a wrong motive. If the words are actionable in themselves, malice will be presumed, till the contrary is shown.



There are certain words actionable in themselves, if spoken with regard to certain persons, which would not be if spoken with regard to common persons. Proof of the words is prima facie evidence of the slander. The Def<sup>t</sup> may prove them true or spoken without malice and in either case it will be no slander. - Many things may be shown, in mitigation of damages. There was <sup>no</sup> malice in law.

Malice does not always attend it with as in the case of manslaughter.

The P<sup>l</sup> may show express malice by other words, and conduct. As if a man were on a charge of perjury he may show that the Def<sup>t</sup> had also charged him with a total want of honesty. - You must take the common consideration of a man to have his temper & mind. The rule is the greater <sup>the</sup> malice, the greater the damages.

115

Words that are actionable in themselves  
are divided into two classes.

I Class. This rule is without exception.

The charges against a man are action-  
able, which bring, or may bring corporal  
punishment. as theft. By the old law  
witchcraft was punished with death,  
of course to charge a man with it, was  
actionable. now the law is altered and  
it is not actionable.

A charge of those crimes which are  
not punished by the courts of com. law  
but only by the ecclesiastical courts, are  
not actionable.

With regard to offences punished by fine.

This depends very much on the state  
of the society. If the charge brings  
with it of course disgrace, as well as  
the fine, it is actionable; not otherwise.

Suppose a man is charged with  
having thrown ballast from a wharf



which & thus incur a penalty of £5: but  
no disgrace. it is not actionable.

Formerly robbing a hen roost was only  
mortal; but a charge of this offence  
would be disgracefull, and therefore  
actionable.

II Class. Words which have a direct ten-  
dency to ruin a mans business, and dry  
up the sources of livelihood, but which  
if spoken by any other man would not  
have this effect, are actionable. --

To say a man is a knave is not con-  
suetudinally actionable, but suppose a man  
charges a Lawyer with being a knave,  
it is actionable, not so concerning a  
Physician. To charge a Lawyer with  
fornication would not be actionable, yet to  
charge a Clergyman with it, would.

III Class. Words spoken degrading or  
slandering a man in office, concerning his official  
conduct are actionable. This goes on the

ground of contempt of government.

116

IV. Class. Words that tend to banish  
a man from Society are actionable.

As some kinds of diseases venereal, etc.

Of words only actionable by reason of special  
damage.

All words are of this description which  
impeach a man's moral character, and  
produce special damage.

The Nat. of limitations only runs on words  
actionable in themselves.

The charge when insolated, may be action-  
able, but when taken in connexion with  
others will not be. Deft may show all the  
conversation. An action was brought by  
a young lady for charge of theft by a young  
man - He allowed he charged her with  
being a thief - but from the connexion  
it appeared he only said she stole his  
heart.



The old maxim was - That words spoken  
in heat and passion are not any thing,  
or justification. There is nothing in  
this maxim, it is never a justification.  
Does it excuse? It may lessen damages  
and may not.

By the declaration the Plff's character  
is put in issue Plff may prove his char-  
acter to be good and fair - Deft may  
prove it, if he can to be bad.

The man that sues for a slander is  
never obliged to look for the source  
from whence the story came. It  
would be dangerous to admit a con-  
trary principle.

It was formerly a maxim - That words  
ought to be taken "in mitiori sensu"  
this proceeding had upon experience - a  
contrary maxim was introduced -

That words were to be taken in "sovereign  
sense". Both are now at an end.

117

You must place the same construction  
on the words as mankind in general  
would - or as would be placed on them  
out of court.

### Lecture April 7<sup>th</sup> -

With respect to a charge of hearn, it is  
actionable.

on E 638

A general charge is to be taken in its tech-  
nical sense but is liable to explanation.

Did he mean to charge the offence? is  
always the question.

1180 77

Suppose a man charges another with  
murder and means it so, and it turns out  
the person supposed to be murdered was  
still alive. it is actionable. but it is



did not mean actually to charge murder it is not actionable. —

Perjury is false swearing before a person who has authority to administer the oath. Suppose that an officer is charged with perjury, that is that he has violated his oath of office - this is not actually perjury, but only a violation of duty - therefore would not support an action for a charge of perjury - but would no doubt be actionable.

A man charged another with being forsworn before the bishop of Norwich this might be in the bishop's court and might not - it would now be actionable. —

A man was charged with giving false testimony in a court of chancery. This was taken according to the old rule of "mitiore sensu" because it might

have been in a point immaterial, and 118  
therefore not perjury. But according  
to modern law and common sense  
it would be actionable. —

A man was said to be detected of  
perjury. — This also was held not to be  
foundation for an action according  
to "strict sense" — but there would be  
no doubt now. —

There was a charge that A, suborned  
B. to swear falsely. The charge was  
allowed by J. H. But he held that  
B. did not in fact swear falsely, it  
does not operate as an excuse for  
a man may be guilty of subornation  
although the truth is a matter to be

4 Cal. 15  
3 Rev. 166  
1 Rott. 39  
64  
6 Rob. 268  
6 Cr. 158

Forgery — In this case words that import  
the charge are actionable as well as in  
others. A says B has forged the hand



of J. Hiles it is necessary here to inquire  
what is proved? If he had said that  
he had forged in a note, bond, &c., &c.  
there could be no doubt, but now it  
must depend on the proof. Suppose  
it turned out that B could write  
like J. Hiles, and for amusement  
had frequently wrote his name. This  
is not a culpable act. —

1 Rolt. 65

Bro. J. 114

Tha. 142

General charge of a thief is actionable.  
A man said of another that he  
had stole trees, but stealing trees ac-  
cording to the old law was not theft.  
Here the action founded on a  
charge of theft would not lie. —

Bro. J. 39

1674

Holt. 381

A man says thus - I charge B with being  
guilty of felony, by taking money out  
of my pocket. This was taken, accord-  
ing to "notiori sensu" - but now is un-  
doubtedly actionable. —

2 Lev. 51

1 vent. 313

2d Ray?

Other cases cited as per margin

To charge a man with being a receiver 119  
of stolen goods - was for want of action-  
=able - it is now.

Singular case on same principle lately  
arose in U. States court - a man was  
charged with having committed a  
crime - he sued for slander - & it proved  
in record of court - that he did commit  
the crime charged - P. off. replied that  
he had been pardoned, and that a  
pardon in the technical sense took  
away the crime - but this is not  
correct, it only takes away the pun- 10th 51  
ishment - It is not actionable -

2 Chap. Whenever a man is charged  
in office with having corrupt views,  
being guilty of partiality, corrupt  
principles, &c it is no matter what  
the office may be whether of profit  
or honor - it is actionable. -  
If it is a lucrative office - that is one by

14th 57  
1 Rev. 280  
6 Rob. 223  
6 Rob. 240  
8 Mod. 217  
2 Sid. Key?  
- 1369



which a man may get his living, want  
of ability, is sufficient ground of action,  
but if of honor then want of ability  
is not a sufficient charge to support  
an action. The real ground of the dis-  
tinction is, that it tends in the first  
1000. 695 case to dry up the sources of livelihood.

Words disgraceful to a man in his profession  
are now actionable in themselves. —

It has been determined that to say of a  
clergyman that he is a drunkard, is  
actionable — so also that he preaches  
nothing but lies — an old rogue, and a  
contemptible fellow — rather have men  
say rake day on Sunday, than to go  
and hear him preach &c. actionable

3 Lev. 17

600. 253

2 Ma. 946

In Connecticut to charge a minister  
with being a liar is actionable

2 Vent. 28

To say a lawyer is a knave is actionable,  
it must be in practice.

It has been determined that to say a shop- 120  
-owner is no scholar is actionable. 140 54

So also to charge a shoemaker with being  
a scholar - or a merchant a bankrupt.

It is not actionable in themselves by reason  
of charging a man with infectious diseases  
must according to the rule be in the present  
tense.

1 Roll. 62  
Cro. J. 222  
1 Lev. 115  
610 6. 585  
2 Ed. Reg. -  
- 1417

Greg. 7. 144  
- 1130  
1 Roll. 43  
- 66

### Lecture April 10<sup>th</sup> 1810.

Of words actionable in themselves by reason  
of special damage. -

The special damage must be laid in  
the declaration. In England it is  
not actionable to charge a man with  
adultery. In this State to charge a  
female with want of chastity, in fact,  
some damage (as a loss of marriage,  
society) is not actionable. So also to  
charge a man with being a brute in



4 Co. 17.  
Cro. J. 323  
Latch. 218

his family, with want of integrity,  
honour, truth &c are not actionable,  
unless special injury results. —

Suppose words are actionable in them-  
selves. may you to enhance the dam-  
-ages show a special damage? The  
rule is that you may if you say it  
in your declaration. This however is  
a dangerous way, because the minds  
of the juries are turned from the words  
to the special damage. It generally  
produces a nonsuit.

Malice. You may always rebut  
malice by proving there was not  
any. — Cases in Bullers & V. Pri. 3<sup>rd</sup>.  
A Person wanted to hire a servant  
and enquired her character of her  
former mistress. — She told her good  
qualities, but says. that she went too

much out-nights, and that she will 121  
not always sleep in her own bed.  
There was no malice, and the action  
was not justified. —

A man asks another if he had better  
buy a third. in the sale of a horse  
he advises him not to, as he apprehends  
he will soon become a bank-  
rupt. no malice. —

Contradictory cases.

John Vokes is put in jail, a man  
is asked what he is in for - why  
says he, I understand for stealing  
a horse. It is true he was put in  
on suspicion of this crime, but it  
turns out - states I told it - there is  
no malice, and not actionable -

If a gentleman tells a man that Vokes  
is in jail for horse stealing, when  
in fact he is put in only for a £5 debt,  
and the man reports it, he cannot



12082  
C. 91

be hurt, for he had every reason to believe the story. —

There may be malus animus, and yet his action not be the remedy, as in the case of a man, preferring a writ before a court of justice, which is false and scandalous in its allegations — must be for malicious prosecution.

42. 14  
C. 230

So if a witness swears to a scandal which he knows to be false. —

Then a man reports scandal after another. —

The other reports say that if the man at the time he tells the story, gives the author, he is not liable, if not, he is. This is not law. He spreads a scandalous report, and the author may

Tracy. 266  
4 Bac. 510.

be a bankrupt.

In the books cited in the margin may be found the true rule. A man has no right to make the report at all.

It is said this has lately been questioned, 122  
Lord Kenyon disapproves of the old  
rule but thinks if the man gives  
his author and he is able to pay  
the former will be excused. This  
I apprehend is not correct you may  
recover out of every slanderer, and  
are not as in trespass confined to  
a single remedy. Suppose a man  
tells a story most manifestly to  
destroy the reputation of another,  
his saying that he got it from  
John Stiles will not excuse his  
maliciousness.

### Concerning charging.

A man says to another, you  
deserve to be hanged, for stealing.  
This contains the charge of theft.

Palmer 68  
1st Ed. 397  
Hunt 2  
Croft 247  
2nd Ed. 300

Haven't you heard that such a man  
steals - no - well I don't see he has. This  
implies stealing and is actionable.



126. 154

Two men were talking about stealing, and one said if I was to guess I should say "Vokes stole Stiles' hay", but it won't guess - actionable.

11 West. 159.

A mere charge of an inclination to do a crime is not actionable of itself, but if the epithet be such as to convey any charge of the fact done it is actionable, as if a man calls another a thief, a rascal, this means only a disposition to steal - but a thieving rascal means he has stole...

Hard 7.

1 Roll 64.

1 do. 277.

A man says, "I know what I am and I know what Vokes is, and I know that I never stole a sheep; actionable -"

1 do. 150.

1 West. 276.

1 Sid 37.

Palm. 64.

1 Roll 47, 51.

There are other cases where there is no doubt concerning the slander, but the difficulty is to make the allegation. As if a man says to B who has 7 brothers, one of your brothers stole a horse, who is bringing the action? can't be brought.

A says to B you stole, and it want I. 123  
This charges B. But suppose he had  
said to B either you or I or C has  
stole, and it want I. who does he charge?

1 Rolt 75<sup>o</sup>  
— 180  
— 81

The rule that words are to be taken in  
their obvious sense has never been al-  
tered.

10. mod. 198

Camp or provincial words are to be taken  
in the sense in which the words are un-  
derstood where used.

1 Rolt 126

6 Rolt 205

Suppose a man flanders another in an  
unknown tongue as Latin. not flander  
unless some one present understands it. 1 Rolt 74

The occasion is to be taken into consid-  
eration. A lawyer speaks many hard

things, but his situation is different  
from most men. He may say things

material to the point, but no other. 6 Rolt 90

Suppose a man has two distinct counts  
one actionable, one not, and verdict  
for Plff. Verdict according to the Eng.



Bullock Pri.  
— 8<sup>th</sup>

ish law must be arrested, but the  
jury must be charged to bring in  
on the actionable count.

28th. 1200

The truth is always a defence. It cannot  
be common law to be given in evi-  
dence under the general issue, must  
be on the face of the declaration.

If the P<sup>l</sup>ff shows other words to prove  
the temper of mind - Def<sup>t</sup> may prove  
the truth of them under the general  
issue. In Coun. if the Def<sup>t</sup> wishes  
to give the truth in evidence, he  
must give the P<sup>l</sup>ff notice before  
trial.

Bullock Pri.  
— 10

### Lecture April 11<sup>th</sup>

When the Def<sup>t</sup> undertakes to justify on other  
grounds than that the words were true, & that  
he was acting as a lawyer he may give  
it in evidence under the general issue, or  
he may plead it specially, but when he  
justifies on the ground that the words  
were true, he must spread it on the record.

46. 13.  
Bro. J. 91

Concerning the declaration.

It always begins with setting out his own good character - but I suppose it would be good if he omitted to do this. In the presumption of law is that every man's character is good till the contrary is proved. In the case of it is stated that he has left his good name among his neighbors - that he has suffered so much damage, which has never been paid the often requested and demanded.

If the action is brought for detaining a man in his office, he ought to show <sup>4th 159</sup> <sub>prob 252</sub> that he was in office. So if the charge is that he is a bankrupt, he ought to show that he was a trader or within the scope of the bankrupt laws.

But if the colloquium is respecting the office above - it would be necessary only to show the colloquium in evidence & not to aver the office in the declaration.



I feel nothing out of character in pub-  
lication of the slander must be set out  
as in the hearing of direct answers. To  
say of a person's testimony is not good till  
after verdict.

11th. 216

Encl. 561

— 186

6th. 39

If the words are spoken in a foreign  
language. It must over some one  
present who understood it.

Next must aver that the words were false  
and maliciously spoken. In one case the  
plea was that the falsely spoke; it  
was held good.

Mon 157

You must state the words. "These words  
and such like" is not good.

Encl. 645

Hard. 305

You must allege the words to be spoken  
of the P. M. or to him.

11th. 55

6th. 126

6th. 39

If the speaking was by way of description  
this would not be sufficient, but it must  
be averred the P. M. was the son of such a  
man, and not of and concerning the P. M.  
Where the slander depends on another fact  
that must be averred - as if a man

6th 8214  
Cory. 687

say of another that he is the worst  
thief in England - it is necessary to prove  
there are thieves in England.

A verdict is not necessary where the words  
themselves import the guilt of the  
thing - Suppose it says B. murdered  
J. Stiles - not necessary to prove the  
murder of Stiles, the words import it. 1st ed. 53.

Inducements are to explain not to enlarge  
the conversation. A man was charged  
with having burned a barn, the fact  
was the barn had hay in it - Declaration  
stated that he charged him with  
burning Stiles' barn full of hay, this  
is a charge of felony - and actionable.  
but to burn a barn without grain or  
hay in it is not felony.

2 Wils. 114  
1 Holt. 82  
46 R. 20

As to Special damage it must be laid  
in declaration, but loss of friends, rep-  
utation &c is not Special damage, his  
some loss as respects his property, or person  
and it must be specifically stated.

If you say Special damage can you



prove other & least damage! No. you can't  
prove only what you say.

460.666 =  
= not law.  
2nd. 18.8.

How to plead a justification.

If the allegation is that the charge  
was general, as that he was a thief, you  
may prove any act of theft. But if the  
charge is specific, as of a theft-proof  
in justification must be confined to this.

180.87.

Justification admits the words, and  
all the malice stated in the declaration.

460.13.230.

bro 8.239.

A Libel or Written Slander.

Slander is no offence, is only a civil in-  
jury - but a libel is an offence and the  
public may prosecute and the party  
injured obtain damages.

This is defined to be malicious slan-  
der in writings, signs, pictures, which  
tend to expose to loss of reputation, or  
to ridicule. Every thing <sup>which is</sup> slander by  
parol, is a libel when reduced to writing.

2 wil. 4.3

Mon. 627

1 Rol. 57

Hard. 470

2. Pa. 878

5 mod. 165

2d. Eng. 415

5 Co. 125

It is a civil injury whether the words  
are actionable in themselves or not.

suppose only the initials of a name are used - it does not body understands it, it is a libel, otherwise it does no harm

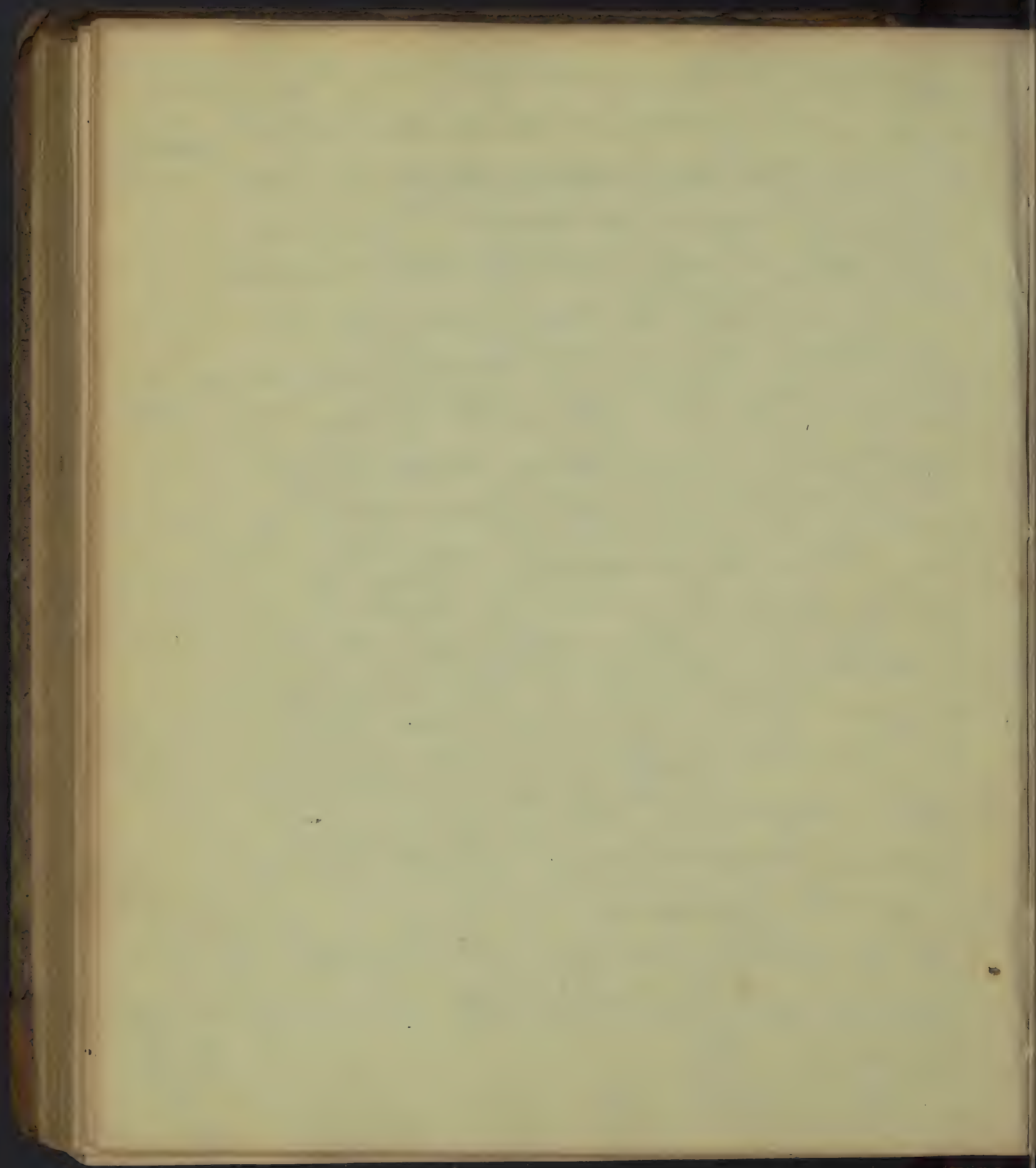
The only enquiry is, does this render him ridiculous? Suppose the thing contained in the writing is true you can as a civil citizen justify even by com. law, Hra 419  
 But as a public offence, the rule is the other way - Principle on which it is founded is this - the public prosecution is brought on the ground of its disturbing the public peace by exciting the passions - it is nothing to the public whether it is true or false - It is a libel to slander the dead. I am prepared that by common law you may give the truth in evidence upon a charge against the government or public officers.

It must be published - The writer, the printer and the book seller are all liable -

17th March 1844

5 Co. 125  
 9 Co. 59  
 more 813.





# Action of Tress.

127

This action originally lay only against the finder of the personal goods of another who converted them to his own use. Hence it is called trover.

3 B. 6. 152

This is an action unknown to the ancient common law, but derived from the Statute of West. 2<sup>nd</sup> which is the foundation of all actions on the case. The common law remedy was defective. Trover now lies where

2. Rec. H. Engl.

89. 202, 3

243. 391

82. 89

one person by any means is possessed of the goods of another and converts them to his own use. If one tortiously takes the goods of another it lies before the Stat of West 2.

There was no remedy but trespass. If one

lawfully obtains goods of another - but destroys them, sells them, wrongfully uses them, or wrongfully refuses to restore them, action of trover lies against him.

62 B. 924

Cro. 50

Pla. 128

Mulk. 1033

3 B. Com. 153

Bro. 6. 781

This action was never heard of till the reign of Henry 8<sup>th</sup> long after Stat. West. 2. which was



4 Rev. Fin. Ed.

526-

385-86-

Bul. J. 233

2 Bul. 313

Ep. Sig. 587

5 Bac. 275

5 Bac. 257

1 Bun. 39

- 39

- 34

3 Bl. Com.

- 153

The design of Edw. 1<sup>st</sup> In Edw. 6. it was  
first brought in its present form.

The fact of finding is immaterial the  
the action with the ag. a real finder.

The gist of the action is the conversion.

The finding is more inducement or form  
in the declaration, it is not necessary.

In most cases then the action is found-  
ed on fiction - hence it cannot be tra-  
versed, nor does the general issue imply  
a traverse of the fact of finding.

I here will observe concerning a proposition  
in the books. It is said when the con-  
version consists of a tortious taking, the  
tort is waived. The only meaning of  
this is that the tort considered as a  
trespass is waived, but not considered  
as a wrong.

Trove has entirely superseded action of  
detinue for two reasons. 1<sup>st</sup> Less certainty  
of ~~cases~~ description is required. 2<sup>nd</sup>  
danger of law is avoided.

A conversion is a wrongful assuming to dispose of the goods of another as if they were one's own. - The least degree of an unlawful interference is conversion.

128

5 Bac. 257.8  
2 Bulst. 260  
1 Wils. 264.  
6 Mod. 212.

A conversion may consist in an unlawful taking - an unlawful user - and an unlawful detainer. These are the only three ways in which there may be a conversion. Either of these is per se a conversion. It follows then that a conversion consists in a misfeasance, or nonfeasance may be evidence, but is not per se a conversion.

In declaring in trover it is never said he unlawfully converted - this would turn it into trespass.

5 Bac. 288 or  
268  
Palk. 655  
1 Roll. 6  
82. Dig. 590

1<sup>st</sup> Wrongful taking. In this case the right of action is complete - there is no need of any demand. - In this case trespass is concurrent with trover.

2 Term. 465  
1 Sid. 264  
5 Bac. 257  
3 Wils. 146  
Burr. 265  
2 Haa. 442

2<sup>nd</sup> Unlawful user. This presupposes the Def<sup>t</sup>'s possession was lawful. Thus if a finder uses the goods found, he is guilty of conversion - So a Bailee in some cases.

5 Bac. 257  
Cro. 214  
1 Com. 221



2 Bule 312

Salk. 655

2 D. m. 153

1 Inst. 571

5 Co. 13<sup>6</sup>

3 Bl. c. m. 153

6 Dec. 217

Shae 576

581

6 Co. 219

8 Co. 146

Hob. 251

5 Burr. 2827

Salk. 143

655

Salk 143

655

misusing, or injuring goods lawfully in  
possession is a conversion. If a carrier of  
a box or bail opens it, it is a conversion.  
If a bailor, or finder of goods destroy them  
it is conversion - but trespass is concurrent.  
The law full user will not in general sup-  
port trespass. Where a carrier of a cask  
of wine drew out part and put in water  
it was held a conversion of the whole, for  
it injured the whole.

Neglect in keeping goods of another, so  
that they are injured is no conversion.  
It is a mere nonfeasance - e. g. if a person finds  
cloth and permits the moths to eat it up.  
No action of trover lies. —

The proper remedy is by special action on  
the case. — On the above principle if a  
carrier loses goods, it is not a conversion.  
Where the unlawful user consists in selling.  
The action of *indebitatus assumpsit* is concur-  
rent with trover. The rule to be observed  
in practice is - Where the goods sell for  
more than their value, then bring

indebit. as. if for his trover.

129

There are some cases where indebit. asump.  
happens, and never are concurrent as  
where the original taking was unlawful,  
and the goods are subsequently sold.

Dalt. 12131  
Coss. 419  
2 Dorn. 144  
1 Dorn. 387  
6 Dorn. 647

3<sup>d</sup> An unlawful detainer. If there has  
been a conversion by the other methods  
there is no need of a request or demand.  
In this case there is no conversion  
until there is a demand.

1 Dalt. 264  
6 Dalt. 589  
590

An unlawful detainer is per se a conversion,  
but a refusal is not, per se a conversion, but  
is prima facie evidence of an unlawful  
detainer. In case of finding, and not  
delivery, the goods & the proof of owner ship  
is exhibited. The goods also may have been  
lost or destroyed without neglect of the  
Def<sup>t</sup>! -

2 Bult. 312  
Coss. 529  
2 Dalt. 752  
2 Bult. 486  
4 Bult. 221  
2 Dorn. 161  
10 Coss.  
3 Dorn. 1243  
contra.  
6 Dalt. 612

If the jury find that the Def<sup>t</sup> only refused  
to deliver when demand was made the  
court can form no judgment against the  
Def<sup>t</sup> - his merely evidence.

10 Coss. 566  
6 Dalt. 47495  
7 Dalt. 148  
3 Bult. 1243



2 H. 31. 254

2 Blak. 117

A judge cannot justify by common law a refusal to deliver on the ground that he had a lien on the property for his expenses.

4 Term 260

If one person places the goods in the hands of another it is an irrevocable conversion.

1 Wils 328

1 Ke. 813

Bullock 247

2 Wils. 242.

A servant is liable for conversion by the command of his master. The law may sue either.

### Lecture. April 13<sup>th</sup>

5 Term 215

1, 95

Who may maintain action of trover. Sometimes either, or two or more persons may maintain the action. This happens generally in bailments. If A lends his goods to be carried to B and the carrier converts them, A must bring the action.

Suppose A sends an order for goods to be delivered to the carrier, and he converts them A is the proper person to bring the action. Suppose A sends for goods, and directs them to be delivered to a certain carrier, but without any

previous employment of the carrier - it  
must bring the action, but if B selects  
the carrier he must bring the action.  
For the carrier is then his agent.

Authority may be found under Bailments.

There has been a question in this case -  
A finds the goods of B & claims them  
to be his, and on the refusal of A to  
deliver, brings his action and recovers.  
The true owner then sues A can he  
recover? It has been once decided  
that he can. I have been always in-  
clined to the opinion that he could  
not - not that the record is proof  
that the goods are not B's - but that  
the law will not compel a man to pay  
twice for the same thing - if B should  
not be the owner another action might  
upon the same principles be sustained.

It would be preferable to say the sum  
claimed by B in the first suit was  
money had and received to the use.



3 Nov. 125 of the true owner.

17 Nov. Bl. 669 /

682

2 Dallas 54

11 Feb. 438

5 Bac. 261

14 Feb. 214

2 Feb. 569

5 Dec. 168

262

14 Feb. 123

1 Bac. 261

44

14 Feb. 40

3 Feb. 140

14 Feb. 282

14 Feb. 33

2 Feb. 47

14 Feb. 33

14 Feb. 57

It is not necessary that the Bailer should have the absolute ownership, for the purpose of maintaining an action.

Bailer may maintain it in many cases against a third person. So a Bailor who has a special property for the time being may maintain it against the wrong-doer. Every Bailor may because every Bailor has a special property.

A Sheriff may maintain an action for goods which have been converted after execution. The foundation of his right is his special property. If a free house of a house which has been blown down, may maintain trover for the timber. He may be considered as a Bailor.

It is settled that a possession gives the holder a right to maintain his action, against all persons, but the true owner. This requires some qualification - The

possession must be peaceful & undisturbed 131  
or color of right, otherwise it confers no  
right. One that can't maintain trover  
against a person who takes stolen goods  
from him. Suppose one finds goods  
he may maintain trover against any  
one who takes them from him. Let he  
sue by them lawfully.

2nd 500  
777  
Butler 33  
500.246  
325 132

The rule then stands thus - Possession  
is a required legally, or by color of  
right - entitles to the action - but under  
possession it is a required otherwise will  
not.

A right of possession is sufficient  
to maintain the action - This necessarily  
implies an interest in the property.  
If the goods of A are taken from his  
servant - A may have an action for  
possession of the servant is possession of  
the master. A right of possession is the  
right of the present actual possession, &  
where there is no right of present actual



possession. This action cannot be main-  
tained. If I let a horse for a week  
he has no right of hypothecation during  
that week but the bailor must bring  
the action.

18th. 65  
18th. 476  
18th. 242  
18th. 606  
17th. 9  
17th. 480

It is agreed that some kind of property  
must exist in the P<sup>l</sup>ff to support this  
action. Hence where P<sup>l</sup>ff sent an order  
to deliver goods to his servant and the  
tradesman delivered them to the servants  
host or innkeeper it was holden that the  
servant's master could not recover, there  
was not a consummation of the sale.

18th. 19  
18th. 556  
18th. 576  
18th. 35-6

An uncertificated Bankrupt may maintain  
this action against any stranger who takes  
his property. He has actual hypothecation,  
and right of recovery against every person  
but a trustee.

18th. 11th.  
18th.  
18th. 11th.  
18th. 11th.  
18th. 11th.

A common law executor or Administrator  
could not maintain an action for conversion  
in the lifetime of the testator but may  
now do that.

18th. 439  
18th. 577  
18th. 580  
18th. 60.  
18th. 105.

As to the manner of declaring, when Exec<sup>r</sup>  
or Admin<sup>r</sup> brings an action - Espinasse has

16  
a wrong case - he says that it is supported  
by the proof of taking in life time of  
the testator, and conversion after his  
death - but the taking must be then  
Simpson - 250 - - -  
137  
Hra. 60.  
8th. 589.

## Lecture April 14<sup>th</sup>

The right of a Bailee to maintain an  
action has been said to be founded on  
the liability over to the Bailor. This is  
not always the case - the rule can mean  
no more than, that he is subject to  
a possible liability.

Bac. 249  
3 Co. 69  
1 Inst. 89.

as a depository as well as any other Bailee  
would have a right to recover even if  
that were the correct rule, but it is  
not - his owing to his special property  
in the goods bailed. He has a right  
against all but the Bailor.

Toms. 112

is laid down as a rule - that if one  
delivers to A. the goods of a stranger  
A. the bailee by delivering them back



1 Roll 666  
—7

again to the Bailor, exempt himself  
from the action of the stranger, and  
even tho it is done, pending the action  
between the stranger and it.

13 Co. 69  
5 Bac. 165

2 Roll. A. 569

A recovery by the bailor puts the  
Bailee off his right of action. — so also  
a recovery by Bailee puts Bailor. —

There can be but one recovery. —

I conceive that a Bailee by commencing  
an action, puts the Bailor, and so vice versa.  
There cannot be two independent actions  
subsisting for the same offence. But if  
Bailor should sue for trespass or  
trover, this is no bar to the Bailee's  
action on the case for his special dam-  
age.

1 Leich. 127.

8 Bac. 559.

The Bailor by suing the wrong doer dis-  
charges the Bailee, because has elected  
his remedy, and prevented the Bailee  
from seeking his security. If the Bailee  
sues first, he makes himself liable to the  
Bailor, as he prevents him from getting  
his remedy out of the wrong doer.

It is laid down as a rule in Baker Reports 133  
that he who has the Special Property or  
Bailee, may maintain perhaps, or move  
against the Bailor, or he that has the  
general property for taking it away.

3 Co. 69

7 Veron. 12

This I apprehend is not correct - he may have  
an action on the case. & is action can be for  
nothing but his special damage, but when  
against a third person it is for the value  
of the property - In this case the value  
of the property is not presumptive by the  
rule of damages - it is not for loss of prop-  
erty but for use of it. Lord Coke says  
that the right of the Bailor, will be in  
mitigation of damages - but this will be to  
establish a new rule of damages - This  
presupposes that originally the value of  
the property was the rule of damages, but  
it was not not in fact even *prima facie*  
a rule of damages. The damages may  
be more than the value of the property



and may be l.f.

Another rule is, that the returning of goods after the conversion goes in mitigation of damages, tho it does notoust the right of action.

The effect of recovery in an action of trover is to vest the property in the Deft. This will not hold when the property has been restored. That goes in mitigation of damages.

As there can never be but one recovery, a recovery against a stranger is a good bar to the action. Suppose C. B. & E. have joined in a conversion - he sues A. afterwards B. B may plead the first recovery in bar. - In torts one recovery is a bar to all other suits. -

Where indebitatus assumpsit, trespass, and trover are concurrent, one is a bar to the other two; for otherwise a man might by changing the form, recover treble damages.

1 Roll. 5<sup>th</sup>  
6 Co J. 148.  
6 mod. 212  
7 Bl. R. 902  
E. p. B. 581

1 Show. 146.  
1 Strange. 1078.  
5 Bac. 257.

6 Co J. 73  
1 Strange. 1078  
E. p. B. 593

5 Bac. 280  
2 Leach. 1217

Against whom it may be brought.

It will lie against one who wrongfully takes goods - in favor of Bailor against Bailee - against a finder - by master against a servant - and generally against all who unlawfully take - unlawfully use - or unlawfully detain.

Another rule - that the owner of personal chattels may maintain trover, not only against the original wrongful taker but against any subsequent bona fide holder; provided there has not intervened a sale in a market overt. The owner may pursue it wherever found.

1 Wils. 8  
Salk. 283  
1 Leon. 158  
Stro. 118  
2 Bl. Com. 450  
1 Bac. 237

Exception - where property consists of money or bills of exchange. In the first case upon motives of policy, to disencumber a circulating medium of all embarrasments. Bills of Exchange in England answer the purpose of circulating medium.

1 Ban. 452  
3 Ban. 156  
1 Bl. R. 485



alk. 126 min. all same, stated on the same footing.  
Doug. 611.  
- 1871 Nov.

## Lecture April 17th

For what the action of trover lies.

It lies for personal chattels in general, but does not lie for any thing real or issuing out of the realty.

Trover may be maintained for choses in action. According to the common law, these are not subject of theft. It was formerly held, that trover would not lie for choses in action but this has long since been overruled.

alk. 687

12th 5

alk. 130

283

654

2 Term. 728

Br. 190

262

contra.

Br. 723

When trover is brought for a chose in action, it is not necessary for the Plff. to allege the date of the instrument.

Trover will lie for a title deed, this is not evidence of a thing in action, but evidence of a thing in possession.

9 mod.  
See former authorities.

This action it is said does not generally lie for 135  
animals *ferae naturae* but I suppose  
the ground of this is that the person has  
no interest in them, for if they are reclaimed  
or confined and are of any value I think  
it clear this action will lie.

11th 288  
1 Holt. 5.  
4. Hl. 235  
6. C. 125.

The authorities in the *King v. Leake* go to the  
rule that trover will lie for animals  
*ferae naturae* if reclaimed. It has been  
decided that it will lie for a parrot or  
a monkey. It is agreed that where the  
animals are merchantable, and confined  
it will lie.

6. J. 262.  
5. Bac. 264.

It has long been settled in England and in  
this State that trover will not lie for  
a negro slave. The reason in Eng. is that  
their law never recognizes slavery in  
any degree - and in Connecticut, we have  
never considered them as absolute prop-  
erty. &c

2d. Ray. 146  
Carr. 397  
2d. Ray. 1274  
3d. Ray. 336  
2d. Ray. 201  
2d. Ray. 785



It does not lie for a public record. The reason is that it cannot be private property - it is a public offence. But the copy of a record is private property and for this it will lie.

The old rule was that it could not be maintained for money or specie, unless in bags or boxes so that it might be identified, but this is now told aside for in trover they do not recover the specific thing as in detinue but damages.

If any one unlawfully obtains money from a man's wife (as by gambling) the husband may recover in trover, so may a master if obtained from the servant.

Where goods are pawned, and tender made at the time of payment, and refusal this action may be maintained by the Pawnor.

If goods are pawned on an usurious contract the Pawnor can't have trover against the

Hand 2/111

Exp. D. 542

Bro. E. 538

— 661

Bro. E. 54

Bro. E. 518

— 541

5 Bac. 264

1 Sid. 122

Bull. No. 33

4 Co. 53<sup>b</sup>

Crif. 244

2d Ed. 416

Bullock. 272

Pawnee till he has tendered the money to 136  
him. The action is not brought to enforce  
the contract but to be relieved against  
it. & if a unrecious contract is void as  
respects the enforcing it, it follows in  
this case the principle of a bill in Eq.  
ity. and he must do equity before he 12 June 1853  
can demand it.

If a donee of goods, by bare gift without  
any act of delivery takes possession, this  
action will lie. but I think there  
must be a demand. The mere taking  
to be given is not a conversion. The  
bare gift without delivery does not  
vest the property, yet it operates as a  
licence to enter. otherwise you might sue  
in trespass. The licence may be retracted 13 Dec. 1839.  
at any time. Ep 2577

It must be observed that a symbolical de-  
livery will be sufficient to transfer the  
property. Thus delivery of a key to the  
room where the goods given were contained



2 Inst. 953  
1 Inst. 102

was he so sufficient.

Salk. 290  
Co. 540  
1 Term. 1058  
12 Reg. 301

The Tenant in com. or joint Tenant - can't maintain this action against his co-tenant and if he does, gen. issue may be pleaded, and this be given in evidence under the issue, for the possession of one is the possession of the other, and so there is no conversion.

1 Inst. 200.<sup>a</sup>  
1 Inst. 363  
- 368  
3 Inst. 100  
q. 34

But if one of two or more joint tenants, or tenants in common, destroys the property, he is deemed to have made a conversion, and is liable in this action. It is admitted to say, he used it for the other.

Salk. 200  
Salk. 4.  
Litt. inst. sec. 323  
Sha. 820  
Co. 450

If one of two joint tenants or tenants in common, brings an action against a stranger for a conversion of property, he must take advantage of the nonjoinder of the other tenant by a plea of abatement. The act of receiving a thing from the freeholder is not such a conversion as will support this action - so taking a door off the hinges,

or taking windows out of a house will not support it.

137  
5 Bac. 257  
Cro. J. 129

If an action is brought for chattles annexed to the freehold, and verdict for the Plff. the formal averment of the Plff. "that he was possessed as of his own goods" will afford a presumption that the goods were his, and that there was a severance, and the Court will give judgment in his favour.

6 W. 139  
- 129

The tortious taking of a thing already severed from the freehold is a conversion.

104. 125  
5 Bac. 257

Where a person being lawfully possessed of another's goods destroys them from necessity, he is not guilty of a conversion. . . if a master of a ship throws goods overboard to save the ship.

2 Bul. 280  
5 Bac. 258

Pleadings. The declaration in this action must state the place of the conversion or it is ill in substance according to the old rule, but it is now considered only as more matter of form.

6 W. 678  
643. 588  
2 Term. 30



Hand 111

moon. 691

2 Laund. 379

Star. 1023.

The declaration ought to show some property in the Plaintiff. If he alleges that he was possessed as of his own goods, it is sufficient.

It is not necessary to state a demand and a refusal - tho' its common to do it in practice, or it is mere evidence of a conversion, and not per se such - its matter of evidence and this never need be stated.

The time of conversion must be alleged; formerly it was held that if the time was not averred it was a fatal defect, that could not be cured by verdict, but it is now settled that it is not a radical defect and may be cured by verdict.

C. 12. 598

1 cent. 135

inj. 428.

A declaration is good after verdict, if there is no repugnancy of time in the declaration, as if declaration stated "that on the 1<sup>st</sup> of April 1810, the Plff. let the Def<sup>t</sup>. have possession of a barrel which he converted to his own use. The 1<sup>st</sup> of March 1810." This declaration would be good after verdict and "the first of March following, 1811" would be considered as surplusage.

C. 12. 384

C. 12. 438

3 B. 374

C. 12. 97

15  
The thing must be described with con-  
ciseness, that it may be known, tho it is  
not required to be so particularly described  
as chattels.

138

1800. 111  
2d. Rep. 588  
991  
Bull. 37  
1812. 809  
992

Erskine says it is unnecessary to state the  
value of the goods - this I think cannot  
be law, for the value of the thing is the  
rule of damages, and there must be some-  
thing which is prima facie the rule of dam-  
ages, or the jury will have no foundation  
on which to assess them.

Exp. 588  
Cro. J. 148  
Bos. 427  
2 Geo. 430  
5 Bac. 275

It is said there are only two good pleas  
to the action of trover - the general issue,  
not a release. The many other pleas  
have been used - Every plea of justifica-  
tion in trover is tantamount to you, it is true.

Exp. 592  
Hos. 1178  
Salk. 654  
Cro. J. 73

In trover justification must always be  
pleaded, but in trover you must plead  
the general issue and give the justification  
in evidence.

Bull. 148  
Exp. 593

Any thing which does not amount to a de-  
nial of the conversion may be specially



Bull. 148

Ex. 12, 573

pleaded, if it does not amount to the  
general issue.

May ~~the~~ which does not amount to a denial.  
The Stat. of limitations does not run against  
Grove in Connecticut.

139

# Action on the case for a malicious Prosecution.

Lecture April 18<sup>th</sup> 1810.

This action lies to recover damages, against any one who has before maliciously prosecuted the Plff. without probable cause. The word prosecute is referable both to criminal, and civil suits. If one individual, prosecutes an indictment, or brings a civil suit, maliciously and without probable cause, this action may be maintained.

J. M. B. 116

1 Mac. 61

Ex. D. 527.8

Com. D. 1st act  
on case.

The word malice imports any wicked motive in general. It does not always import malignity and ill will. A prosecution may be instituted to obtain the penalty without personal hatred.

The expression "without probable cause" means without any reasonable ground. It must be apparently groundless.



This action is antient to the old action  
of conspiracy, now very much out of use.  
The action of conspiracy only lies against  
two or more, and only on a malicious  
prosecution for treason or felony. There  
has been much confusion with regard  
to the boundaries of these two actions.

1. *Brund.* 238<sup>a</sup>  
*Fincham* 305  
2. *Hals.* 271.  
3. *36. Com.* 126.

There is another action which bears to an  
action for malicious prosecution, a still  
greater similarity - viz. an action on the  
case in the nature of a conspiracy.

It lies where two or more have conspired  
to prosecute the *Plff.* maliciously and  
without cause - or where they have con-  
spired to injure him in person, property,  
or reputation.

*Fincham* 305  
*Hals.* 14  
*Ex.* 2530  
1. *Bac.* 61  
1. *Brund.* 230<sup>a</sup>

This then is in some respects more  
extensive than an action for malicious prose-  
cution. It lies tho' no prosecution has  
been actually commenced, if injury re-  
sult from the combination.

The gist or gravamen of the action for

malicious prosecution resembles that of slander. 140  
 Action for conspiracy does not ~~depend~~ for  
 on the case in nature of a conspiracy  
 may have for the gist either the injury  
 is reputation, or property. It is not ne-  
 cessarily the danger to which has been  
 exposed but the scandal, expense of the  
 suit &c.

10 mod. 219  
 talk 13.14  
 1 Ann. 691

Action of conspiracy will not lie unless 1. Rolt. 112  
 the P<sup>ty</sup> has been not only prosecuted, but 12. Co. 23  
 formally acquitted. An indictment, how- 1. K. B. 114  
 ever for conspiracy will lie, tho nothing 116  
 has been done in pursuance of the combina- 260  
 tion. Tho the parties have changed 1. Wils. 211  
 their purpose, or been deterred they are  
 guilty of an indictable offence. 2. Rev. 51  
 4 Co. 56<sup>b</sup>

An action in the case in the nature of a  
 conspiracy will lie tho the indictment has  
 not been presented. P<sup>ty</sup> must have in  
 such case some actual damage. The law  
 implies damage, only when the action  
 has been brought. & wrong done without



1 Jac. 61  
1 R. M. 112.

1 Com. Act on  
con. the benefit

Damage can never be the foundation  
for an action.

In an action of conspiracy if all but one  
are acquitted, judgment can never be  
rendered against him, on the other  
hand on an action in nature of conspi-  
racy, or malicious prosecution, judg-  
ment may go against one, upon the  
acquittal of all the rest. This distinction  
is founded on two reasons. 1<sup>st</sup> The action  
of conspiracy is founded on a form of  
the writ and supposes that one person  
can't be guilty of a conspiracy. 2<sup>d</sup> In  
action of conspiracy the grievance is  
the danger to which the P<sup>ty</sup> is personally  
exposed, but in action in nature of conspiracy  
the damage consequent is the grievance.

Bulst. P. 114  
C. M. 416  
1. 2. and 230<sup>th</sup>  
1 Mod. 210  
1. 1. 691  
6 Mod. 169  
2 Dec. 52

2 Co. 52  
6 Mod. 173<sup>rd</sup>  
- 139

There is a difference <sup>action on</sup> between a malicious pros-  
ecution and an action in nature of a conspiracy.  
The first may be brought against one or more,  
but the other must be brought against two  
or more, or against one charging that he

another or others (who are not *depts*) had  
contained &c

1441  
Wils. 210  
1 *Am. L.* 230.  
9 *Am. L.* 408  
Wils. 11.

According to the better opinion not all  
these actions were unknown to the common  
law. It is clear that the action for a  
malicious prosecution, and the action  
in the case in the nature of a conspiracy  
were unknown. But there has been  
some dispute with regard to the other,  
but I apprehend it is now clearly settled  
that it was created in the reign of Ed. 1  
entirely by the government.

3 *Rever. His.*  
Edwards 58  
127  
2. 30 - 239  
328  
(cont.)  
Wils. 12. 11.

I have here but three common law actions  
founded on torts viz. Trespass, Right of Way & Detour.

## Seculare April 19<sup>th</sup>

It is essential that malice and want of probable  
cause should have concurred to support this  
action. Neither of these alone will support  
the action. A man may prosecute real guilt  
from a bad motive or an apparent guilt  
from a good motive. The former is right  
in law, the latter excusable.

1 *Comm.* 544.5  
1 *Am. L.* 1971  
Wils. 12. 11.



sub. 900

It follows from this deniction that it is a  
sufficient defence to the Def. that there was  
probable cause.

The rule is that it lies against any man who  
has prosecuted, either knowing the charge to  
be false, or not having reasonable ground to  
believe it true.

In Connecticut when an action is brought  
on a civil suit, it is called an action for  
a vexatious suit, when on a criminal  
prosecution an action for a malicious pros-  
ecution. No distinction in name is made  
in England. But as there is some real  
difference between them I shall first con-  
sider, the action for a malicious pros-  
ecution of a criminal nature, then of  
a civil.

If one is falsely and maliciously indicted  
of a crime which exposes life or liberty,  
or injures his reputation or property, or  
subjects him to expense, he may maintain

Salk. 14  
M. 46  
H. 379.

This action.

tha. 977

Exp. 525

Husband may sue alone for malicious prosecution of his wife inasmuch as he was put to expense.

It is no answer to this action that the indictment was ill or insufficient in law, so that the Plff. was in no danger of conviction, for expense alone will maintain the action.

This rule as laid down by Lord Holt is qualified by adding, if it is injurious to the Plff's reputation. This qualification is not necessary. - Expense alone is sufficient to maintain this action. This case is sufficient to settle this point. - An action was brought maliciously, and without probable cause against a man for using a lawfull trade without being qualified - this did not endanger life, liberty or reputation, yet it was held an action for malicious prosecution would lie on the ground of expense. If an insufficient indictment has not been found by the Grand jury, it is not a good answer.

4 Teren 248

3 Bl. 6. 127

Salk 15 in

the margin.

10 mod 148

Exp. 2. 525

2 Bra. 977

Salk 14

Exp. 490



1 Leon. 187.  
6 Rep. 130.  
2 Term. 231.  
1 Bac. 61.

Public officers commencing prosecutions upon  
false informations ex officio, are not liable to  
this action, but the person giving the  
false information is liable.

6 Rep. 130.  
2 Term. 225.  
— 231.

If a Public officer without information, of  
his own information, prosecutes another, he  
is liable to this action. This applies to an of-  
ficer acting ministerially not judicially.  
If the officer prosecutes and arrests, the action  
must be for trespass and false imprisonment.

It must always appear on the face of the dec-  
laration, that the former suit or prosecution  
is at end. A party who is sub lite can never  
oustake that action by bringing this.

In action of conspiracy he must be techni-  
cally acquitted.

The words that the Plff has been discharged  
from prison are not sufficient. The safest  
way is to state the manner in which the  
former prosecution is at an end.

9 Co 56<sup>b</sup>  
Doug. 205  
10 Mod. 209  
11 Co. 267.  
1 Stra. 114  
2 Term. 231  
1 Paund. 228  
6 Rep. 532.

A declaration of this kind will be aided by  
verdict.

If the Pff alleges that the former prosecution 113  
was ended one way when in fact it was terminated  
another it will be a fatal variance, and the  
declaration will not be supported; as it be <sup>talk. 21.</sup>  
Hater acquitted when in fact was not pro. <sup>Bullock 14</sup>  
it is bad. <sup>Exp. 2536</sup>  
<sup>6 mo. 261</sup>

The declaration takes all the proceeding in the  
original prosecution - any material that is <sup>1 term. 590</sup>  
~~immaterial~~ <sup>is</sup> material is a variance which is fatal, but <sup>6 mo. 216</sup>  
not in an immaterial part. Courts are <sup>2 B.R. 1950</sup>  
very particular with regard to variances. <sup>Exp. 2532</sup>

It is a settled rule of the English law that  
no action will lie against a judge of a court  
of record, petit jury, grand jury, even for  
a malicious prosecution in exercise of their  
offices. They must however be acting in a  
judicial capacity. as a Justice of Peace when  
he acts ministerially is liable when judicially  
not. This rule is founded on general <sup>new. 172</sup>  
principles of expediency. The State has <sup>22 Geo. H. 2 Law</sup>  
its claims upon them, for in this there is <sup>318</sup>  
no inconvenience or harm. <sup>2 B.R. 1141.5</sup>  
<sup>1 term. 563.</sup>  
<sup>513.514.</sup>  
<sup>534.5.537.8</sup>  
<sup>1 track. 191</sup>  
<sup>12 Co. 23.4</sup>



11 Term. 544  
4 Burr. 1974

Malice may be, and is generally inferred from the want of probable cause, but want of probable cause can never be inferred even from the most express malice.

11 Ma. 691  
Ex. 2. 535

It is always expedient for P<sup>l</sup>ff to prove actual malice if he can, and this by collateral circumstances &c as in action of Slander.

11 Wils. 232  
Hob. 267  
6 Mod. 262

The conviction of the P<sup>l</sup>ff in the original action by competent jurisdiction is conclusive evidence of the existence of probable cause. But a conviction before a court not having jurisdiction is void.

11 Wils. 232  
Ex. 2. 530

An acquittal of P<sup>l</sup>ff in former prosecution is in most cases presumptive evidence of a want of probable cause. The onus probandi is then thrown upon the Def<sup>t</sup> where it is presumptive evidence.

4 Term. 247  
Saik. 15.

An acquittal on a defect in original prosecution, comes within the last rule.

Lecture & April 23<sup>d</sup>

I have said that the conviction of the present Plff was conclusive evidence of probable cause in the former prosecution. So also an acquittal in the former prosecution is in most cases presumptive evidence of want of probable cause. But an acquittal is not always prima facie evidence of the want of probable cause. The finding of a bill of indictment by the Grand jury, or the binding over to trial by the Court is presumptive evidence of probable cause - and the subsequent acquittal by the Court having jurisdiction of the cause will not rebut this presumptive evidence - but the onus probandi is thrown upon the Plff. So also if there has been no former finding of bill by Grand jury, nor any binding over by Ct. then an acquittal is presumptive evidence



Bull. N. 14

Salt. 15

Exp. 529, 530

of want of probable cause, and the onus  
probandi is thrown upon the Deft! -

But when the facts on which the former  
prosecution was founded are in the knowl-  
edge of the Deft! in this case he must  
show the probable cause for the indictment,  
as if it procures B to be indicted for  
robbing him, he must show the probable  
cause by the testimony which he laid  
before the grand jury.

Bull. N. 14

1 mod. 216

Exp. 535-

536

The existence of probable cause in every  
particular case is a mixed question, con-  
sisting of fact and law, but what matters  
or things amount to probable cause is a  
mere matter of law. Whether certain cir-  
cumstances exist to show probable cause is  
matter of fact only, but the inference  
from these facts is a question to be decided  
by law.

1 Term. 545

519

Bull. N. 14

Exp. 529

It follows from this distinction that the  
Def't's ground of suspicion should be spe-  
cially shown.

Bro. 134

Exp. 533

There cannot in legal contemplation exist <sup>145</sup>  
probable cause, unless the crime of which  
the Plff was prosecuted was actually com-  
mitted. If it was committed by some other  
person, there may be circumstances amount-  
ing to probable cause against Plff.

6 Wm 216.

2 Hawk 122.

Ex 2. 534.

So also whether the former prosecution was  
malicious is matter of fact - to be determi-  
ned by jury - but what facts shall amount  
to a malicious prosecution is a question  
of law to be determined by the Court.

2 Ld Ray 1493

13 Term 1519

1 Wils. 233

It is a rule of practice in England that where  
the action is brought for a malicious  
prosecution for felony - the Plff can't -  
support his action without a copy of the  
original record granted by the court upon  
motion - The granting is discretionary with  
the court. But if it is for a misdemeanor  
only such a copy is not necessary - any  
copy will do. I do not see the ground of  
this distinction.

1 Bl. 1385

1 Bac. 61

Ex 2. 534



2<sup>nd</sup> Division - of actions for civil prosecutions.

This action also lays for a former civil prosecution, if it is malicious and without probable cause. This is called in Count. a malicious law suit.

The general rule is that this action does not lie for bringing a grounded civil suit, because a civil suit is a claim of right. The Plff is liable to pay costs, and to be amerced by the Court. There are several exceptions to this rule, but as the rule now stands it is very incorrectly expressed. As it stands it is no more true in a civil than in a criminal prosecution. The true meaning is - that where the former suit was civil, the law presumes no damage, and the Def<sup>t</sup> can't maintain an action for a malicious prosecution without showing special damage. The rule as laid down is liable to these exceptions.

I. Tho there was a good ground of action

Salk 13. 14

Bull N.P. 11

Ex R. 525

13. 23 Pulkor  
205

in favor of A. against B. the present Plff. 1146  
yet if J. Stiles brought the action without  
authority from A. he is liable.

Why is J. Stiles liable? He is not amercible  
and liable for costs, because his name  
is not on the record, and A. disclaims the  
action.

II. When the Plff. in the original suit has  
good cause of action, but sues in a court  
having no jurisdiction - this action will lie,  
because he could not be amerced or  
taxed to pay costs, for this would be pre-<sup>4 Co. 14</sup>  
-supposing jurisdiction. It is necessary that <sup>Bull. 12</sup>  
the Plff. should have known the court <sup>2 Wils. 302.</sup>  
had not jurisdiction, because otherwise <sup>Bull. 12</sup>  
there is no malice. <sup>2 Wils. 302</sup>

III. If a person having no right of action,  
and knowing it, sues another for the purpose  
of vexation, he is liable for special damage <sup>2 Wils. 305</sup>  
which must be always stated, as imprison-<sup>13 Co. Bull. -</sup>  
ment, expense &c. There are no cases of this <sup>383 -</sup>  
kind in the old books - it formerly was not law. <sup>2 do. 129</sup>  
<sup>3 East 314</sup>



IV If for the purpose of vexation one having  
a claim, sue for a much larger amount,  
invidious the Deft. was holden to excessive  
bail, it will lie. The fact of excessive bail  
must appear on the declaration.

It follows from the general rule as ex-  
plained by these exceptions, that in one  
case viz in criminal prosecutions, the  
law presumes damage, in civil actions  
it presumes no damage - but if this  
presumption can be removed, the ac-  
tion will lie.

Where the original suit was utterly  
groundless, tho the injury is only to the  
Deft's property - this action will be  
supported.

### Lecture April 24<sup>th</sup>

It is a rule that when this action is founded  
on a former civil suit, the very grievance  
must be stated, the special damage what-  
ever it is must be alleged in the declaration.

1 Ca. 424

Bulk. 12

1 Sams. 228

406. 205.

- 266.

Bulk. 12.

350. 527.

2. Wils. 303. 5

Bulk. 14

1. Wils. 424

When this action is founded on a former criminal prosecution, stating the damage generally is sufficient.

147  
Ld Ray 380  
— 374

But to this rule there is an exception - viz - where a mere stranger incites another to bring a groundless suit; here you may state the damage generally against the stranger, same as if it was former criminal prosecution.

Ld Ray 380  
Salk. 14

I have said that when the former suit was a public prosecution, it must be determined before this action can be brought. —

But where this action is brought for a former civil suit, 'tis necessary that actual damage should have been incurred or that it should be inevitable, and 'tis also necessary that the former civil suit should have been determined in order to maintain this. — But 'tis necessary that the former civil suit should be determined, still 'tis not necessary that it should have been decided in favour of the Plff. for if he was acquitted 'tis sufficient to support this action.

Str. 114  
Bulke. 13

Bulke. 13  
Exp. 527



Stat 429

In Court we have a Stat. on this subject which provides that this action will lie against any person who wilfully & wrongfully wrongs by commencing and prosecuting a suit &c with intent unjustly to vex and trouble him, such person shall pay treble damages to the party aggrieved. It also makes the bringing of vexatious suit a crime, by inflicting a fine of 7 dolls. and for the third offence it shall be deemed barratry.

Stat 429.

In this action two persons cannot join as Plffs for the injuries are separate & personal to same as slander. But there may be two Defts in this case - this is strictly a tort in which two persons may be joined. But there cannot be two Defts in an action of slander.

King 145

3rd Ed 5  
1st Ed 79  
2. 910

There have been two cases in England, whether if damages are given against two Defts they can be severed - in one case it was said they could, but it was afterwards overruled, & determined that the damages must be entire, and this I think is the correct rule.

1st Ed 79  
2. do 910

# Assault & Battery 148

An assault is an attempt or offer to do a corporal hurt - to another without actually doing it, and without touching him. as presenting a gun or sword or shaking the fist &c, is an assault or unlawful settling on another with an attempt to hurt him. This is an inchoate violence, is begun and not completed, and for this injury, an action may be sustained.

1 Vent. 256

1 Mod. 133

Bull. No. 15

1 Bac. 154

2 Mod. 545

3. N. H. Hist.

- 85-

3 Bl. G. 120

But a gesture which might otherwise be an assault - may be so explained by words as to fall short of it, as if one says hold of his sword and says it it were not a fire time I would beat you - this is not an assault. It follows then that the intention must operate with the act to constitute an assault, but in battery, it need not.

Ex. D. 312



13 ac. 154  
2 R. 11. 548  
1 H. 133

Threatening words alone never can amount to an assault, tho it was held otherwise anciently.

Battery consists in the actual commission of violence upon the person of another and as to this it is agreed that the least degree of violence, committed in an angry spiteful, insolent, or rude manner amounts to a battery. So spitting in another's face, or pinching his nose, or treading on his toes if done under the forementioned circumstances is a battery.

If the actual injury done is merely nominal then the mere touching another is not a battery unless it is done in an angry, spiteful & manner. But if there is an actual or substantial injury then this action will lie although it was not done in an angry, rude or indecent manner. This is an important distinction.

13 ac. 154  
6 mod. 149  
172  
1 H. 134

Mr Justice Blackstone has evidently given an

149  
incorrect definition of a battery, he says  
is an unlawful beating of another. now it is  
clear this is in many cases justifiable, as if  
a parent whips his child, is a battery, but  
is not unlawful, but an unlawful act—  
cannot be justifiable.

A Battery is a actual violence committed 3 Bl. C. 126  
on the person of another and is not always <sup>Salk. 407</sup>  
unlawful.

Every battery includes an assault, every  
consummate violence includes an inchoate  
violence, hence proof of a battery will <sup>Salk. 384</sup>  
support an action of assault and battery. <sup>1 Hardk. 134</sup>  
<sup>1 Bac. 154</sup>

Threatening words alone do not amount to  
an assault, yet menaces of bodily hurt  
are actionable injuries, and the rule is  
if they occasion an actual inconvenience  
to another they are actionable, and this  
action is said by Blackstone to be *happi  
bi et armis*. As if A terrifies B in such a  
manner, that he cannot attend to his  
business, an action will lie, but says, *et c.*



3 Bl. 6120  
Finch 202  
16 Am. 590  
2 R. H. 545

Could I should say this should be an action on the case, according to all the analogies in the law, for the gravamen of this is merely the interruption of ones business - is a mere omission and the damage only consequential.

The injury, which will support an action of Battery must be immediate, but it is not necessary, it should be the instantaneous effect of the act of the Deft - for if the injury is produced by a continued train of physical causes - which flowed from the act of the Deft - this action will lie, and he is considered the author of the whole. As the squib case -

Shepherd & Scott.  
2 Bl. 892  
1 Ha. 634  
3 Wils. 403

Lecture April 25<sup>th</sup>

Exp. 2313  
B. & W. 16

If one person should push another against a third, he would be liable in this action for B is the mere instrument of A.

If a horse taking a sudden fright runs

2  
against another person and injures him. Is the  
rider is not liable at all, tho he would  
be liable if he was guilty of negligence  
or imprudence, in riding such wild horse  
among a crowd of people, but the action  
should be case and not trespass, for this  
act of violence was in no way the act of  
the Def<sup>t</sup>.

But if a third person should strike  
a horse and he should run and injure an-  
other, ~~such~~ person would be liable and  
not the rider - and the action in this case  
is trespass or assault and battery.

Calh. 637  
4 mod 405  
505  
1 mod 24  
Buller 16 =  
= not correct.

When a person receives a bodily hurt  
from an act to which he consented - he may  
in some cases maintain this action and in  
some not. The rule of discrimination is that  
when the act is lawful he cannot, because  
the consent may then be plead as a justifi-  
cation - but if the act consented to be un-  
lawful, an action may be maintained.

Exp. 813  
1 Bac. A. 154

As if two persons agree to play at cudgels  
and one is injured, no action lies, because



it is a lawfull game but otherwise in case  
of boxing because this is unlawful. -  
'I doubt the latter part of the rule, "in  
pari delicto melior est conditio defendentis"  
If they are prosecuted at the suit of the  
public, it is never an excuse that there  
was an agreement between the parties. But  
if one will consent that another shall  
whip him, or pull a tooth for experiment or  
out of his folly - no action I apprehend  
could be supported.

It is clearly a good excuse that the injury  
happened in an amicable contest, as in  
wrestling. It seems to be settled law that  
if one in defending himself against the  
attacks of another, accidentally hurts a  
person behind him, he is liable to this ac-  
tion. The question is who shall bear  
the loss? The law says he who did the  
injury. This example proves that for the pur-  
pose of maintaining an action of assault &  
Battery, a malicious intent is not necessary  
to be shown. If there is no justification nor

Cumt. 215  
Bridg. 17  
2 Geo. 174

2 BR. 596  
3 Ray 468

no lawful excuse there is no need of it. 151

It is laid down in 'Cospinares Digest' that it must be willful or for want of proper care. but a lunatic is liable to this action, but he has no will, so also is an idiot or a child of any age. These cases show that Cospinares is incorrect, and that the intention is not regarded upon a question of guilty or not guilty. - the no doubt damages would be mitigated.

Heb. 134

Latch. 13

Doug. 640

1. Donb. 81

To support a public prosecution, intention is necessary; the wife must concur with the act. It is a general rule that in actions of trespass on the case, there must be a criminal intent. but there exceptions to this as in the case of trover. -

Foulblanque says that it is sufficient if the Def. has been the physical cause, or means of the injury to support this action. But this rule I think is too broad says C. W. Gould, for if a person seized with a



fit should fall against another and break  
 his leg he would not be liable, but his mean-  
 ing undoubtedly is that where the Def<sup>t</sup> has  
 been the agent in working the injury, he  
 will be liable, but his meaning undoubtedly  
 is, that where the Def<sup>t</sup> and this is correct  
 is a rule that nothing will be an excuse  
 for the injury done, except inevitable ac-  
 -cident or necessity, or what no human  
 power could prevent.

260t. 134  
 1 Comd. 559  
 1 Allw. 35  
 2 Kolt. 548  
 3 Wils. 377  
 410  
 2 H.L. 896  
 1 Bontl. 81

Lord Mansfield says that inevitable accident  
 has been too loosely expressed, it seems to have  
 been considered that if a man exercised due  
 care, and an accident happened, it was con-  
 sidered to be an inevitable accident, but I  
 consider that inevitable accident means  
 something that physical strength can't avoid,  
 for a man may exercise due care and still  
 be liable i.e. such care as the most prudent  
 man in the world would exercise.

6pt. 313  
 1 Acc. 1545

In most cases of involuntary trespass there

seems to be some degree of neglect on which the 152  
 court ground their judgment, but still if  
 there was no neglect, the action may be main- 4 Burr. 292  
 tained in many cases.

When the accident is inevitable then it is ex-  
 -cusable. But there is another distinction to  
 be observed i.e. whether the act which the  
 person was doing, at the time the accident  
 happened was lawful or unlawful.

Where the person is doing an unlawful  
 act, he is liable for every accident which  
 happens in consequence thereof, in some way  
 or other, if it is the immediate consequence, 2 B. & A. 893  
 of the unlawful act, then he is liable in rep- 2d Ray. 1574  
 -pase, if consequential then on the case. - 450  
 12 Mod. 639  
 1 Vent. 295

These rules are applicable to all cases of rep-  
 -pase with force.

## Lecture April 26

The defences to liability battery are three  
 kinds. 1<sup>st</sup> A denial of the charge. 2<sup>nd</sup> excuse  
 3<sup>rd</sup> Justification. Denial is made by



2 Ind. 217

The general issue General issue is not guilty.  
Excuse may be pleaded specially or joined  
under the general issue.

(Battery is many times justifiable - To be  
justified, is to be sanctioned or approved  
by law. Excuse does not amount to a  
justification.

1 Hunt. 130.1

1 Bacc. 155

There are a variety of cases in which the  
Def. is justified - Thus an officer in making  
an arrest may use violence so far as is  
necessary to effect it: But a battery is not  
justifiable by an officer unless there is  
actual resistance or an attempt to escape.

2 Hwa. 1049

3 Id. 403

3 Id. 6. 93

Bull. N. 18. 19

The right of arrest does not include a right  
to beat.

1 B. 229

A mere right to arrest will justify an  
assault, but not a battery. An officer  
need not say there was resistance.

2 Hwa. 149

2 Id. 546

1 Bacc. 159

Bull. N. 19

The law will not justify a battery  
in the officer - yet he may justify a  
molester man in pursuit, because no pro-  
cess can be served without it.

The plea of mutuality cannot in fact be made as well of a battery as an assault, and when it is made to a declaration charging with an assault and battery, it goes as well to the battery as an assault, but it does not go to wounding or mayhem, because it cannot be said to be the same in law as wounding.

Skinn. 387  
Cro. E. 3. 14  
3 Lev. 404  
Essex. 314  
2 Vent. 193

The law that it distinguishes between battery and wounding, has not defined wounding. Every wounding includes a battery, and a laceration or contusion.

A battery is justifiable on the ground of self defence. If one strike me first I may strike him in return, if he sues me I may justify on the ground of "son assault domain". A previous assault by the Dff. will justify a battery by Dff; as if one menaces or attempts to strike another, he will be justified in striking, for he is not bound to wait the blow.

Bull. 17  
J. Com. 589  
1. Edition.

There must always be preserved some pro-



proportion between the battery on a servant  
of Defendant and that of the Plaintiff. It is not to  
be understood that they are to be equal,  
violence cannot be measured, but they  
must not be disproportioned to each other.

8 N. P. 18

11 mod 43.

This proportion is always a question of evi-  
dence, to be determined by the jury.

Salk. 642.

1 Mod. 246.

A flight blow given by Plaintiff will not justify  
such an one by Defendant as will occasion a  
mayhem. The ground is self defence.

The amount of the plea son assault domineer,  
is that at the time and place mentioned  
in the declaration, the Plaintiff with force & arms  
assaulted the Defendant and would have beaten  
and evilly intreated him &c. and that if any  
damage has accrued it is the fault of the  
Plaintiff and not the Defendant.

Salk. 642

E. P. 315

Plead. 4th

447

In strictness of law a mayhem is not justified  
unless the violence of the Plaintiff was such as  
might endanger the life or limbs of the Defendant.  
So the plea of son assault domineer the  
proper replication is by way of denial - de in-

1 B. R. 177

11 mod 43

Salk. 642

1 Mod. 315

4  
- jura sua propria, absque latē causa

1571  
5 Col. 66  
1 B. & P. 76

In some cases Deft. is justified in a battery, where Plff was the blameable cause. Thus the Plff did not actually strike or attempt to strike him. As when the Plff & Deft were gambling, and Plff put his money into the heap with the Deft's and a scuffle ensued, here the Deft. was justified in a battery. -

2d Rev. 177  
Lalk 642  
11 mod 43  
Cro. 2366

There are many cases where batteries are justified on account of the relation which subsists between the parties. As Parent & child, Master & servant, Goaler & prisoner, Schoolmaster and pupil, and according to common law Husband and wife. These constitute special justifications. It has been doubted whether a husband had a right to correct his wife, according to a late report, the opinion of Justice Buller was, that by common law husband had a power of moderate chastisement over the wife. A man may justify a battery in defence of his wife, and she in defence of her husband, so may a parent in defence of his

12d 176.7  
1 Hawk. 130  
Buller 15  
J. & B. 56  
1 Bac 15.5



child, master and servant. When it is said that a husband is justified, it is meant that by law, owing to the relationship, he is placed in the same situation as the party himself, he interferes on the ground of self-defence - and so of the other relations mentioned.

La Ray. 62  
Bull. No. 13

It is a clear case that a servant may justify in defence of his master, but it has been a subject of dispute, whether a master may justify in defence of his servant. There are many contrary authorities. I take the better opinion to be that he may. The only objection ever offered is that he has a remedy at law - per quod servitium amittit. But the same is the case with regard to a husband, or a parent. They both have remedies.

5 Bac. 568  
La Ray. 62  
Bull. No. 18  
14  
Falk. 407  
1 Bl. 429  
1 Hale. 184

The plea must show that it was done in the defence of the party injured, and to prevent the injury. The law never allows any thing vindictive.

La Ray. 62  
6 p. 380  
218

Lecture April 27<sup>th</sup>

155

One may justify battery in defence of his property when forcibly invaded, as by breaking a door or gate. Where there is only an entry, a battery cannot be justified until after a request to depart, but where there is actual force there is no need of a request to depart.

1 Hawk. P.C.  
130  
Salk. 641  
Bull. N.P. 19

According to a great number of authorities where the original entry is upon lands, a battery must be justified not as a battery but as a murther man in person. There does not appear to be any sound reasoning in this rule. That the law should justify battery in fact but not in pleading is certainly very arbitrary. Lord Henyon seems lately to deny the authorities.

1 D. Ray. 62  
Salk. 407  
1 mod. 36  
Bull. N.P. 314  
315

These rules which justify a battery in defence of property, contemplate the owner of the property in possession for whom he is defended

8 Term 78.



2 Bacch. 555  
9 Bl. C. 179  
4-22-148

a different rule obtains. A man may justify battery in defending possession not in regaining them. According to the ancient common law, one who had a right of possession was allowed to regain the possession by force from the dispossessor or dispossessor, but not a personal chattel.

same author.

Section 239

By several ancient English Statutes, the first of which is that of Rich.<sup>d</sup> 2.<sup>d</sup> a person who has the right is not allowed to enter lands in possession of another unless in a peaceable manner. The same rule is introduced by Stat. in Connecticut.

same author.

These Statutes contemplate such possessions only as are in some degree abandoned by the owner. As if A leases land to B for ten years and after the expiration of the term B continues to hold - here A abandoned at first to B. At common law, in case of personal property (as stated above) the owner was not allowed to regain possession by force unless feloniously taken. There seems to be something arbitrary

in this distinction, between real and personal estate, I suppose however says Mr Gould the reason was that the old common law of England entertained a high reverence for real estate, and paid but a slight attention to personal.

3 Bl. C. 4. 5

2 Roll. A. 35

2 Roll. A. 365

(Bare provocation, indignity, or insult cannot justify a battery; it goes far in mitigation of damages.

1 Wils. 6.

Exp. D. 317

A servant can't justify a battery in defence of his masters goods.

Bro. C. on C.

— 242

5 Com. 354

1 Edition.

These are the principle grounds of justification. If one commits two or more batteries at different times, they cannot (as in case of trespass) be laid with a continuando, nor as a battery committed *diversis diebus et vicibus*.

A battery is one entire individual act, says Lord Mansfield.

1 Cowp. 828

Salk. 638. 9

3 Bl. C. 212

Where a battery is committed on a married woman, the husband and wife must join



in the suit, and it must be laid ad dam-  
num a m. forum, for the husband is sub-  
jected to expense &c

1 Sid 387  
1 Rot 732  
Lo Ray. 1208  
Lo Ray. 1208  
If damages are laid only in the name of the  
husband, judgment will be arrested even  
after verdict.

1 Sta. 480  
If two persons one is husband and wife  
when they are not so in fact, the Deft-  
cannot show it under the general issue  
but must plead it specially in abatement.

If husband and wife have both been bat-  
tered, he must sue for his own battery alone,  
and join for hers. If they sue for both  
together and entire damages are given, judg-  
ment will be arrested in toto, but if se-  
veral damages are given that part only  
will be arrested which respects the hus-  
band for as to the wife's, the joinder is  
not Lt.

2 Sid 316  
1 Rot 782  
Bro. 655

A Plff may lay in his declaration many cir-  
-cumstances for which he has no right to re-  
-cover damages, and this is said for the har-

done of aggravating damages. as if a person  
could not but at the time the Deft made  
an assault and battery on him, he also af-  
faulted and beat his servant and children.

The reasoning above is hardly correct.  
They are to show the aggravated cir-  
cumstances under which the wrong was

Atk. 642

done or is a description only.  
Whenever the Deft. relies on matter of  
justification, he must plead it specially  
and not under the general issue. This  
is not our law.

Atk. 282.  
Exp. 2. 317

If the Deft. raises his plea and then offers  
evidence under general issue which would  
have amounted to a justification, this will  
go in mitigation of damages not to support  
his plea of not guilty.

Words spoken at the time of the transaction  
may sometimes amount to a justification,  
yet if they are not specially pleaded as  
such they will not destroy the action.

Atk. 317



Book 637

1 Bac 125  
5 com 354  
1801

643917

Book 17  
Mc 637  
H mod. 404

Mc 381  
com. 381  
3 m. 16.

If a Defendant justifies an assault and battery  
he must confess it otherwise his plea is  
ill. The most usual plea of justification  
is non assaut & denegance.

If the Defendant pleads non assaut & denegance  
and the Plaintiff can justify his first assault  
he must specially plead it in his re-  
plication. This rule obtains as well in  
our law as in the English.

Matter of excuse may be either pleaded spe-  
cially, or given under the general issue.

To the plea of molitor manus imposit,  
Plaintiff may either plead de non tort & denegance,  
this is a denial of the cause of justification.  
or he may reply that he committed an  
outrageous battery absque hoc - molitor  
manus imposit. - Both can't be used  
for then the replication would be double.

Lecture c April 28. 1810.

158

In an action of assault and battery, as in all actions of trespass, the Plff. is not bound to lay the true day in declaration, and of course in evidence he is not confined to the time as declared.

In Connecticut he can't prove a battery, or more than three years past, for the Stat. of limitations runs against any battery for more than three years old.

The Dft. when he pleads specially must cover the whole time or as much as the declaration can reach - and this is the rule in all actions of trespass - having justified on one day, he must have the rest of the time.

The better way, however, is to plead, not guilty as to all days except as to one, and then plead a special justification as to that. To this rule there is an except when his justification is "on assault & battery".

5 Bac. 206.7

Took. 104.

2 S. & 295.

Balk. 17.

4 Bac. 79.

13 Inst. 283.

12 Del. 229.



for if the Deft can prove that the Plff did  
 assault at any one time it is considered  
 as identifying the time of the battery, or  
 is *prima facie* evidence of it. The Plff can-  
 not be allowed to <sup>prove</sup> ~~show~~ any other bat-  
 tery nor can he answer to this plea. If  
 the Plff wishes to show another battery;  
 and that it is different from the one  
 justified by the Deft he must show it  
 by "novel assignement".

Bulle N<sup>o</sup> 17  
 Pleas. M<sup>o</sup> 447  
 Appends to  
 Reason on pleading

The Deft's plea should be coextensive with  
 the declaration as to the subject matter,  
 thus if Plff complains of assault, battery  
 and kidnapping, if the Deft only justifies  
 the assault and battery - "molliter manus  
 insonuit" this is bad as to all the

inst. 268.  
 E. M. D. 318

charges, for a plea that is bad as a part,  
 is always bad as to the whole.

The plea of molliter manus insonuit, is  
 never answer to a kidnapping or a  
 way house, but a plea of non assault de mune

covers the whole of the grievance, for 1st 159  
The Df. has a right to justify or  
wounding or maiming him &c. This plea in-  
cludes it in the words, for if any damage  
has accrued &c. 812. 318

In a justification raised in the relations  
of husband and wife, Parent and Child &c.  
The Df. must be allowed to have been  
in defence of the wife and to prevent her  
from being injured &c. 2d. 62 in  
2d. 546  
812. 318.  
812. 353.

of former recovery of damages by the Df.  
for the same injury, whether from the  
Present Df. or not, is a good plea in bar  
to the action. This is the universal rule  
in trespass. But in actions on contract this  
rule does not hold. The rule holds when new  
damages accrue from the original wrong  
after recovery, for you cannot bring another  
action. As if a Df. should sue in battery  
and either he, or the court a. h. h. h. h. h.  
him to be greatly injured, but after  
judgment for small damages, he loses a  
rule 90  
rule 73  
5th Dec. 1855  
Salk. 11  
rule 80. 20



ball 11.  
§ 8. 414

him in consequence of the battery, he cannot  
sue again.

220. 320

In the case generally a former recovery is  
a bar to all continued happenings, committed  
before the date of the first writ.

If the injury is done by several, the Plff  
may sue one or all of them.

220. 66  
§ 8. 415

A release to one is a release to all, each  
is liable for the whole.

The question when, or how far the jury may  
revel the damages, is involved in very great  
complexity. If two or more persons are char-  
ged jointly with having committed the  
same battery, and are found guilty jointly,  
the jury can't sever the damages, particu-  
larly if the Defs join in one plea, if  
they sever in their plea, that is if one joins  
separately and another pleads the general issue  
it is said they may have separate dam-  
ages. I think the latter part of this  
rule is incorrect. The act of one is the

act of the other. The finding is against  
both, they are jointly charged and are  
jointly guilty. & I nowance in pleading  
can't prevent each from being liable for the  
whole.

165  
Brof. 118  
Hutkins. 317  
Barth. 19  
11 Coke 5  
5th Dec. 2790

It is clear that if judgment goes against  
both by default, the damages can be re-  
covered.

11th. 421

It has been decided in our case that if the  
Def'ts sever in their pleas - the jury may  
sever the damages. Against this opinion  
however there is a powerful list of authorities,  
as may be seen by the margin. I take  
the latter to be the better opinion. In  
cases where the jury can't sever damages  
the Plff may <sup>prevent</sup> error by remitting  
one assessment and taking judgment  
on the other. Thus if one is ordered to pay

2d Ma. 1143  
5th 79  
3d S. 420.  
contra  
Brof. 384  
11th  
Ga. 12 19  
Bro. 8. 860  
9 Coke 54  
P. H. St. in  
this State in  
case of Wheeler  
and London.

\$1500 another 500, he may remit the 500.

The Plff has his election to take judgment  
against one only provided he will enter a  
nolle prosequi against the other. The Plff  
may always accept judgment, if he so elects, if

6th. 19. 20  
11 Coke 7a  
Bull. 88. 20



prob 173  
Carth. 19  
Forb. 70

The jury sever damages, when they ought not to, that is he may have the jury ordered to consolidate the damages.

It is said a jury may in *repleas*, find one guilty of one part, and another guilty as to another part, and then sever the damages. Because they are not found to be jointly guilty. This seems to be questionable according to a case in *Coke* the jury can't find the parties guilty of different portions of the same battery unless at different times. This rule has been adopted in this State by the Superior Court. Justice Butler accepts it expressly in his *Visi Prius* and *vis* I think is the correct rule.

11 *Coke* 5. 7  
*Bro* 1. 54  
*Fulle* 18. 20  
contra  
*Exp* 420.

## Lecture April 30<sup>th</sup> 1810

According to English law a *notte* prosequi as to one of several parties before judgment against the others, discharges the whole. This is not agreeable to the practice of this State.

*Hob* 70.  
180  
*Carth.* 19  
*Fulle* 18. 20  
*Exp* 173.  
176

When the Plff has brought this action  
 against several, the court will give the  
 Plff leave to erase or strike out one name.  
 The name however cannot be erased  
 without the consent of the Deft, whose  
 name is erased. This is frequently done  
 that the Deft may be enabled to testify.  
 On the other hand it sometimes happens that  
 the Plff will arbitrarily make a stranger  
 to the battery, or party to the transac-  
 tion as Deft to prevent him from testi-  
 fying for the Deft. It is a rule in such  
 case, that if no manner of evidence is  
 produced against him he may be sworn  
 and testify for Deft. but if there is any  
 evidence at all, he never can be sworn  
 till he is tried, but when the evidence is  
 very slight, the court may direct the  
 jury to find the issue as to him first,  
 and then upon acquittal he may testify.  
 All causes of action arising ex delicto.

2 Dec. 287  
 C. A. P. 285  
 18 D. 441



5 Term. 651.

whether ~~tripp~~ a case are several - still  
however the parties may be joined, at  
the discretion of the J. P. Perhaps then it  
would be more correct to say, they, are  
joint and several.

2 Roll. 404  
Cro. 39. 54  
W. 3. 421

In this action the jury may vary from the  
direction and instead of finding guilty  
as to the whole may find guilty as to  
part; and not as to the residue - or they  
may find guilty generally, and a J. P.  
damages only as to the part which has  
been proved.

A finding by the jury of more than is  
put in issue, is idle, this if part is hav-  
ersed and part demurred to they are only  
to find on the part traversed, the verdict  
as to the rest is idle.

If however there has been a mayhem, the  
J. P. may upon view of it increase  
the damages, given by the jury, at  
their discretion and this although mayhem

is not properly charged in the declaration, 16 L.  
decided that the judge certifies that the  
Def. has committed mayhem, or reports  
being a judge of a court above. Damages  
can't be increased by a judge at nisi prius,  
it must be done by the court itself.

The Off. must be present in person at the  
time of this motion, that he may be  
inspected. This doctrine is founded on  
the rule that by the common law, on  
an appeal of mayhem the question whether  
or mayhem or not, was to be decided  
by inspection.

12 Rep. 176  
Litch. 123  
1 Sid. 104  
3 B. & C. 332  
1 Wils. 5

The judges can never increase damages in  
case of mayhem, unless it is proved that  
the hurt inspected, be the same as the  
one found by the jury and charged in  
the declaration.

12 Rep. 176

In analogy to this rule is settled in England  
that damages may be increased in case of  
wounding and malicious battery. It is an  
established rule of practice not to increase

12 Rep. 176  
3 B. & C. 332



He damages if the Judge before whom the  
case was tried, declares his opinion, that  
the damages given by the jury are suf-  
ficient.

3 Wils. 5<sup>th</sup>

It is entirely wrong for the jury to  
give more damages than are demanded in  
the declaration, it may be more than re-  
gularity, it may be fatal, as if judgment  
is rendered on the whole of the verdict,  
it will be bad. If the jury find more  
than is laid, the Plff to prevent error  
must remit the part over the sum laid.  
I do not myself see the necessity of the Plff's  
remitting formally, but I should suppose  
the court were competent to disregard  
the excess as surplusage.

ref. 297

21

1120. 115-6

1860. 366 43

4 Dec. 25. 6

Every assault and battery is a public, as  
well as a private wrong, and may be pros-  
ecuted at the suit of the public by in-  
dignity. The punishment is by fine and  
imprisonment.

Arch. 34

1860. 145

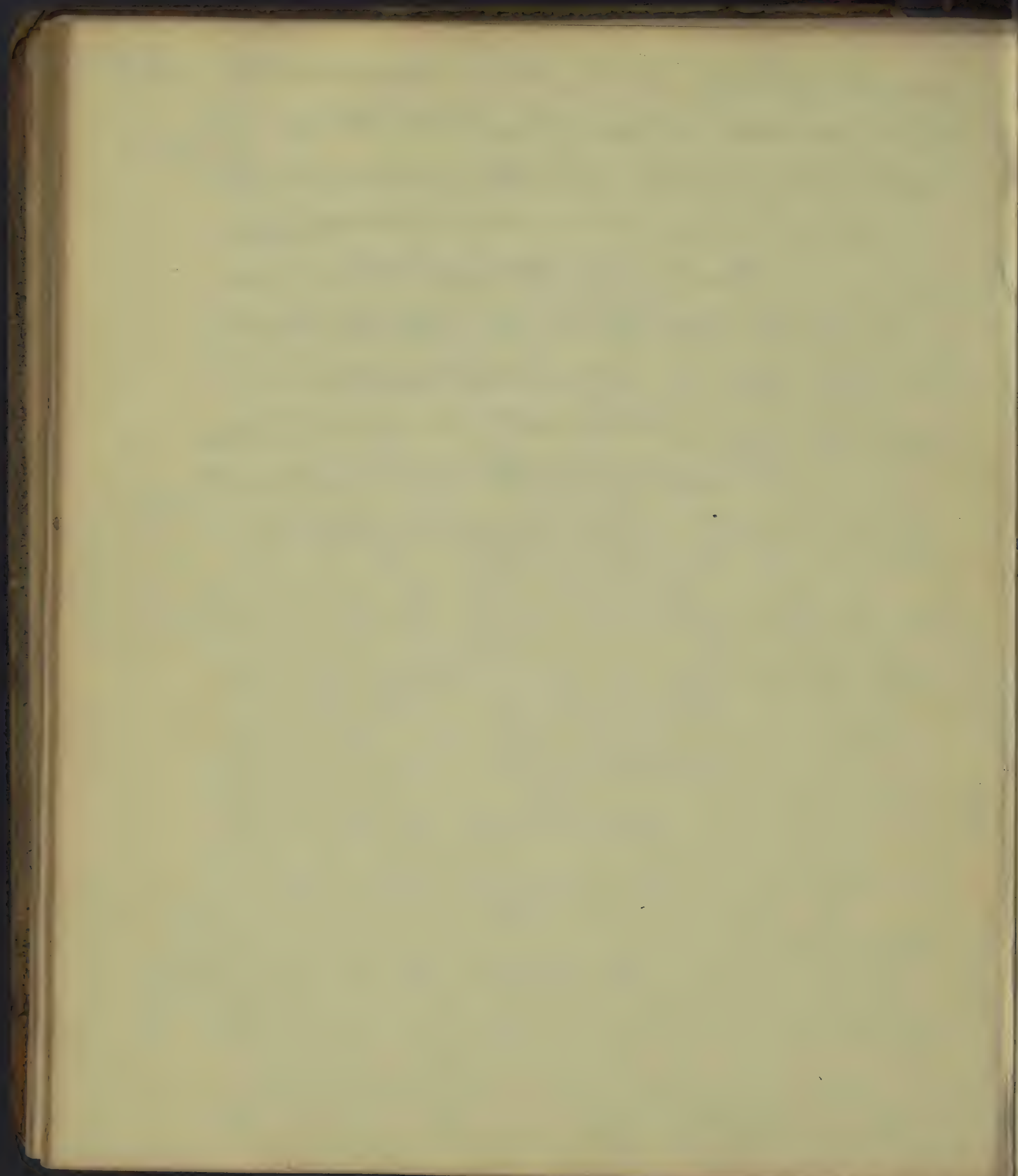
216

1870 - 121

We have Statute in this State which

enables the party injured to prosecute  
by a civil law action by which the party <sup>g. l. comm.</sup>  
recovers damages and the public obtains <sup>lib. & acc.</sup>  
justice. There is also another Statute con-  
cerning secret assaults, when there is no  
witness present, this is peculiar to larceny.  
It was formerly a question whether or  
not for a secret assault could be maintained  
when two or more committed it in secret with-  
out witnesses - It is decided that it could be. <sup>1005.</sup>





# False Imprisonment.

Every unlawful restraint of ones liberty is called false imprisonment in law, or a violation of ones right of locus motionis.

It is no matter where or what the place is, as in the street tied to a tree, <sup>3 B. & C. 127</sup> but in <sup>High. law. 202</sup> a private house &c.

To constitute false imprisonment then two things are necessary, to concur. 1<sup>st</sup> Deten- <sup>3 B. & C. 127</sup> tion of the person. 2<sup>d</sup> An unlawful de- <sup>High. law. 202</sup> tention. The unlawfulness of the detention consists in the want of lawful authority to detain or imprison. Lawful authority may be founded either on legal process or on some special circumstance arising from the necessity of the case. As a justification. Thus the first a sheriff's writ under process, in the other



346.127  
24.45

can any person arrest a felon without  
warrant, indeed it is prohibited by law.  
The action of false imprisonment will not lie on  
the capture of a crew of a ship even if she is  
not a lawful prize. This is a matter of ad-  
miralty jurisdiction, to be decided and re-  
solved by the law of nations.

346.127  
24.45

Some arrest of a person without a warrant  
in a civil cause is regularly unlawful, yet  
a Parent may confine his minor child, a  
master his servant, and a husband his  
wife, but to strangers not in these relations  
the rule applies.

346.127  
24.45

It is said that altho every confinement in a  
civil cause is regularly unlawful, yet a private  
person is not liable for arresting or confining  
a person at command or by the authority  
of the Sheriff - This however is not an ex-  
ception to the general rule, for the immu-  
nity of the Sheriff extends to the private  
person. It has been lately decided in *Thompson*

in *Broughton v. Buller*, that the Sheriff 165  
may not commit a person to the custody  
of a private man while he absents him-  
self. it is not however necessary that  
the Sheriff should be actually in sight <sup>9 Bac. 109</sup>  
of the Prisoner. <sup>224. 1501.</sup>

Lecture c May, 1<sup>st</sup> 1810.

An officer having made an arrest on final  
process cannot delegate his right of custody  
to another person in his absence. Upon  
writ process it may be different, the <sup>1 Bos & Pulce</sup>  
I should not decide on that point. <sup>24</sup>  
The most usual cases that occur of false  
imprisonment are arrests made under void  
process. & to void process there are many  
distinctions. If a court of record, from any  
motives even a bad one, commits a person  
to custody, even against the known prin-  
ciples of law and with a malicious object,  
the Judge is not liable if he acted within



12th 114  
16th 346  
25th 1141  
17th 513  
21st  
31st  
34th 5  
37

his judicial powers. The plea that he acted  
as a judge of a court of record is conclusive, it  
is a plea of no contradiction.

12th 114  
16th 346

It seems then to be a settled rule of the common  
law that a judge of a court of record of  
general jurisdiction, is not answerable for any  
mistake, provided he had jurisdiction of the  
subject matter.

12th 114  
16th 346

If a court of record of even general jurisdiction  
acts in a case in which it has no jurisdiction of  
the subject matter, the Judges are liable as any  
other persons. They do not act judicially, for  
it is coram non iudice. As if the court of com-  
mon pleas in England commit to prison on a  
criminal offence, they are liable for they  
have no jurisdiction over criminal offences.  
On the other hand if they have jurisdiction  
of the subject matter and yet in their pro-  
ceedings transgress the limits which the law  
has prescribed, they are not liable.  
A want or defect of jurisdiction may go  
either to the subject matter, or to privilege,

or defect of person or some other collateral matter - In the latter case it is not, non est iudex, but if the privilege is not pleaded he is supposed to submit to the jurisdiction, but he may oust the jurisdiction by pleading it his privilege - by the subject matter is meant the question or controversy in the particular cause of action.

15. do. 10.  
23. 2. 145  
Salt. 396.

Suppose an action of debt is brought in the Common Pleas against a Peer. There is no doubt but the court has jurisdiction, but a Peer is not liable to a capias - the court however if it issues a capias the judges are not liable nor the Sheriff for they acted within their jurisdiction.

A distinction is made between courts of general and <sup>limited</sup> special jurisdiction - The reason of the distinction is not to me obvious. In courts of limited jurisdiction they are liable if they transgress their jurisdiction even by mistake. Suppose a court of limited jurisdiction can hold pleas of debt to a certain amount and a Peer is before is

2 B. & 1145



L. 11454  
S. 114.  
Ma. 993.  
12th. 396.

will before it, and they issue a capias, then  
are liable. This is a rigorous rule.

If a court of limited jurisdiction is a court of  
record, and exceed their jurisdiction, they are  
liable, but there is here a distinction, they  
are not liable for mistakes in opinion without  
exceeding the limits of their jurisdiction, and  
they are not liable in this case even for un-  
lawful acts. Suppose a court of record of lim-  
ited jurisdiction overrule a demurrer when  
the declaration is clearly bad, they are not  
liable, it is a mistake, but suppose it is de-  
cided from malicious motives, they still  
are not liable if they confine themselves  
to their jurisdiction.

Salk. 196.  
Coh. 2. 326.  
L. 31. Rep. 1145

The precise distinction then, between courts of  
record of a general jurisdiction, and courts  
of record of a limited jurisdiction, is this  
that the Judges of the former court if they  
have jurisdiction over the subject matter,  
are not liable if they exceed their jurisdiction,  
in the latter case they are liable although they

have a jurisdiction over the subject matter, 167  
for exercising their jurisdiction. By the

common law in England courts act of  
record as Justices of Peace in England are  
liable for any mistake in judgment. It is  
is a very rigorous rule it must be confessed.  
It has been mitigated in some measure  
by late Statutes. They may be prosecuted  
by information - but the rule adopted in  
King's bench is never to grant the information  
if the Justice acted honestly.

2 Bl. R. 1145  
Haw. 710  
1 Bl. Com. 354.  
1 Burr. 545  
1 Term 536.

Term. 653

Justices of the Peace in Connecticut have the  
same immunity as other judges of record  
for he is a Judge of record. He does not con-  
stitute a court of limited jurisdiction ac-  
cording to the reception of it in England  
here it refers merely to locality of juris-  
diction. Our city courts are courts of limited  
jurisdiction. We have in Connecticut, no  
courts but those of record. It is laid down  
by Lord Holt that a court which has  
power to fine and imprison, is a court of



record and no other - This is denied to be  
 a correct definition by Chief Justice D. Jay.  
 no correct definition of a court has yet been  
 given. Whenever a writ of record will lie  
 that is a court of record, but it does not  
 follow that when it will not lie it is not so.  
 as above of Jews, or our supreme court of  
 errors. It was formerly supposed in Pennsylvania  
 that town-ship officers in the estate of an insolvent  
 person were a court of record, and an appeal  
 was taken from them but the Superior Court  
 decided against it and that they constituted  
 no court.

2d Aug. 467  
 1st Dec. 255  
 1st Dec. 471  
 3d Dec. 255  
 2d Dec. 1140.

## Lecture c May 2. 1840

There are some cases where persons are exempted  
 from arrest by reason of their character, privi-  
 lege, and from peculiar temporary circum-  
 stances. Thus Exec<sup>rs</sup> and Adminis<sup>rs</sup> are not  
 liable unless on a suggestion of a deceiver,  
 but is he is not liable unless for his own  
 acts, but for any duty or debt of the intestate.

168  
he cannot be arrested. Action of habeas corpus  
suumt will lie against the Principal, Sheriff  
and Attorney, severally or as joint Defendants.  
The general rule is that an Attorney who is  
instrumental in an illegal arrest is liable,  
with his Principal but he must actually be  
instrumental as by counseling, advising, &c.  
The exemption of Administrators and Executors arises  
from the representative character in which  
they are sued. In this case it seems, and I  
apprehend it to be correct, that the Sheriff  
or officer making the arrest would not be  
liable for an arrest unless provided the  
process was issued by a court of general  
jurisdiction, having jurisdiction of the  
subject matter, for he is obliged to execute  
the process. It is an agreed point that a Sheriff  
is not liable if he arrests a Prisoner on a writ  
from the Court of common Pleas. But the At-  
torney and Principal are voluntarily and  
liable.



Temporary circumstances may exempt from arrest, as in case of a person attending in court of justice either as suitor or a witness, they are exempted while going to court, while attending there, and returning home. This exemption extends not only to his person, but to his books or means of conveyance, to his money and to his necessaries.

4 C.C. 222  
2 P.A. 273  
1 Fm. H. 696  
4 Com. 475

In case of suitor or witness the arrest is not illegal in the first instance, for the party now officer is not bound to know his exemption. But the court will issue a writ of superdedas, and after this the detention is unlawful.

4 Bac. 222  
5 Term. 334  
2 B. & R. 1142  
5 Bac. 171.  
Cry. 379

This is equivalent to a new arrest or imprisonment. There is some diversity of opinion in the books, on the question, whether the sheriff is liable after a superdedas, but there is no doubt with regard to the principal. Hence it has been laid down expressly in some books that the sheriff will be liable, and I think the opinion correct.

5 Bac. 171.  
4 Bac. 684.5  
Cry. 379  
6 B. & R. 52.  
3 B. & R. 97.  
185. Doug. 362.

The *supersedeas* has as much authority to make  
the Sheriff discontinue the arrest as the writs  
had originally for him to make it. In Bonn  
the usual practice is to obtain for the party  
a writ of protection before he comes to court  
to testify as a party to a suit. This operates  
as a *supersedeas* after arrest in England. If  
upon arrest he shows his protection, and after  
is arrested, the officer as well as Plff is liable  
to an action for false imprisonment. This is  
said to be not so much a privilege of the  
party as the court. The writ is good the  
only objection is to the time of serving it. 1. J. 220.  
2. B. R. 1193.  
The Def. is bound to enter common bail, and  
the suit proceeds.

For the case of a *Writ* the rule is that the  
officer is not liable, or a certified bankrupt.  
He is certainly not liable till after *supersedeas*.  
The Party however is liable, because  
the exemption is personal, after the *supersedeas*.  
The Rec may sue for the previous arrest.



Don. 140  
10.6.70.  
Atkins v.  
23.11.23.

Ed. Mansfield says that the action after  
sequestration may be act on the case, but  
we could doubt the correctness of this  
dictum, and says it must be *per se*.  
The privilege of a debtor is not *stricti juris*, it  
will be refused where there is any collusion, as  
a sham trial for the purpose of letting out  
the party with impunity. Where there  
is really a bona fide suit in court, they  
must be privileged.

Don. 140  
17.11.23.  
2.11.1193  
11.11.79.

When a party attends court as a volunteer  
pretending to believe there is process against  
him when there is none, he may be arrested.

alk 544.

Ed. Attendance before arbitrator is a  
like exemption, when the subpoena is  
made a rule of court.

2.11.89

A debtor detaining his prisoner after  
the debt is discharged, or cause of commit-  
ment removed, till the prison fees are  
paid is not false imprisonment. He has a  
lien on his person. But a debtor cannot detain

his prisoner till his bond is paid. This is  
a more private contract which the Gaoler  
is not obliged to make.

5 cr 171  
2 cr 53  
Root 58.

When the process or order of court requires  
the person to be confined in any particular  
prison, confinement in any other prison is  
false imprisonment. For the Sheriff has no  
other authority except what he derives  
from the court.

Call 408  
3 cr 214  
5 mod 295  
5 Pac 171

It has been decided in Connecticut that an officer  
has an escape warrant, he may arrest a pris-  
oner who has escaped into any other State.

Root 107

It has become a question of great importance  
in the U. States, whether the bail can arrest  
in another State. My opinion is that  
he can, it may be found in Days' Epist. Day's Epist.  
-ape vol 5. 172.

Day's Epist.  
172

Lecture: May 3<sup>rd</sup> 1810.

A peace officer is also justified in arresting a  
person without a warrant on a reasonable charge



of felony, the felony should afterwards  
have never to have been committed. There-  
fore the rule was made, by the ancient com-  
mon law, the officer making the arrest, if  
the charge on which he arrested him pro-  
ved false. This was a rigorous rule and  
Lord Mansfield decided that he was not  
liable, if there was a reasonable charge of  
felony.

2 Wms. 345  
334  
4 Bac. 517.

This rule does not hold as to private per-  
sons. But if the felony has been committed,  
a private person may arrest a man whom  
he has good reason to suspect has committed

2 Wms. 345  
6th Ed. 334.5.  
5 Bac. 171.  
1 Root. 66.

the felony, and take him before a magistrate  
for trial.

1 Bulst. 150.  
2 Hawk. 52.

A private person may also arrest a felon to  
prevent his escape.

At common law an arrest in a civil case  
on Sunday was legal, but now an arrest made  
on Sunday is void, and the person arrested

may have an action for false imprisonment,  
against the officer who arrested him.

But it is said that bail may arrest their  
principal, or retake him on Sunday to have  
him before the court, because it is said that  
he is in nature of a jailor, and the principal  
in nature of a prisoner. But this rule is  
not yet settled, tho' it is clear that a jailor  
may retake a prisoner who has escaped from  
prison on Sunday.

If an officer breaks open an outer door or  
window and arrests a person, he is liable  
for false imprisonment if the arrest is for a  
civil action, the law will not justify breaking  
open the back house. It is considered as his  
castle. But a man's house is no protection to  
him in criminal cases. But this rule does not  
extend to inner doors or partitions, if he can  
enter the outer door without force, he may

177

alk. 78

2 Al. 2. 1195

1st m. 265

2 Bult. 72

3 mod. 95

4. alk. 626

3. 20. 148

2. 2. 605

2. 3. 119. 73

5. 1. 73<sup>rd</sup>

1. 1. 62

6. 1. 1



in the  
8th

in the use of any force or violence to execute  
the process, even to the destruction of the house.  
if he can execute it without, but he must  
first make a demand of the <sup>Deft's</sup> body or  
goods as the case may be for he can justify  
no violence if he can execute the process  
without.

book 1  
no. 6. 93  
2 Bac 367  
6 out 2  
5 Co. 93

But in this case it has been questioned  
whether the arrest was good of itself, and  
the person arrested had no remedy, but by  
an action for an illegal arrest, or whether  
the arrest was void, and the person had a  
right to be discharged from the arrest on  
motion - But it is now settled that the pro-  
cess is void, and the officer is also liable  
for false imprisonment.

So also it has been questioned whether if  
there is an illegal arrest in consequence of which an-  
other is made by another person, whether  
the latter will be void. But it is now settled  
that if there is a bona fide arrest without

5

any collusion between the two persons a vesting 172  
in the arrest will be good, but if there  
is any collusion between the parties arresting,  
so that it shall secretly break open the house  
of B and arrest him, and then that C shall  
arrest B while in the custody of A. Then the 2 B.C.R. 923  
arrest of both shall be void.

So also if an officer through mistake arrest  
one person instead of another, the officer is  
liable for false imprisonment. The law in this  
case as I have before said, does not regard  
the intent. But there is no doubt but that  
such mistake might be given in evidence  
to mitigate the damages, though the gist of  
the action whether guilty or not, would not  
turn on such mistake. It is also said that if  
the officer arrests in consequence of being  
misinformed by the prisoner himself, still  
he will be liable. As if an officer has an  
attachment for J. Stiles and enquires of Stiles  
for Stiles, and Stiles says I am the man &



He is arrested, still hopes may have this ac-  
-tion for false imprisonment. This rule I  
think is not founded on principle or equity;  
for surely no man ought to have a remedy  
for an injury, occasioned by his own wrong.  
In Rome both the man and his goods  
obedient in rem et in personam, i.e. the officer  
may attach the goods or the body, but if the  
officer arrests the person when sufficient goods  
are tendered to him, to pay the debt, he will  
be guilty of false imprisonment. But in England the  
writs capias ad satisfaciendum, et fieri facias,  
et levare facias, are all distinct writs; so that  
on a fieri facias he must arrest the body, nor  
on a capias can he take the goods, but must  
have two separate writs.

Every individual has a right to arrest a  
person who is fighting, or disturbing the peace, in  
order to put an end to the affray.

Executors and Administrators I have said are not  
liable to arrest. So also in some cases some vessels

Heard. 52.3

1700. 557

2 R. 4452

1700. 120

2 R. 4452

1700. 171.

1700. 136

2. 51.

are not liable to be held in custody on a *marce*  
process, where the husband and wife have  
both been legally arrested.

173

2 Ha 1272

12 Ha 758

13 Ha 120

14 Ha 649

A Person arresting another upon suspicion of  
some crime by authority of a *procedo* warrant  
from a Justice for the purpose of examining  
him before a Magistrate is not liable for  
false imprisonment but this must be for a short  
time only, and the Court must decide whether  
it was a short and reasonable time or not.

13 Ha 172

14 Ha 459

15 Ha 829

So a person without a warrant may  
arrest a mad man or a maniac to prevent him  
from doing mischief.

5 Ba 472

There is a great diversity of opinion about the  
liability of officers arresting under the authority  
of Courts. It is said by some that if a *procedo*  
officer makes an arrest upon a *procedo*, from  
the face of which it appears that the Court



Head 480  
Bull. VP. 82  
Lip. D. 391  
Pemb.  
148 Reg. 230  
10 Co. 76.

10 Co. 76. 7  
Critic  
Lo. Reg. 230.  
Critic 314  
Sta. 701.  
— 493.  
— 509.  
L. with. 390.

Head 480  
Bull. VP. 823  
148 Reg. 4.

Bull. VP. 82. 3  
Head 480  
Sta 710

is not jurisdiction of the case. he will be liable for the arrest, though the jurisdiction goes only to the person or the place as the arrest of a Peer or the officers of a particular court, not to the subject matter of the writ, by which he said he is not liable.

But this rule has been extended farther, for it has been held that if a court of limited jurisdiction, which has not cognizance of the case, whether it goes to the locality of the case merely, or whether it goes to the subject matter itself, or whether it appears on the face of the process or not, the officer will be liable for the arrest.

The decision of the case cited from Lake is that every thing done under the process is void, if the court have not jurisdiction of the case. But the following I think is the true rule, that when a court of limited jurisdiction has jurisdiction of the subject matter of the writ, and the defective part is something merely personal or local, which does not appear upon the face of

6  
The writ, the officer is not liable.

1774  
L. 2. 250  
c. 20.

But Lord Raymond goes farther and says the officer is not liable, even though the defect does appear on the face of the writ, but all 3 Lord's Lord Ray: are at issue on this point. On this point are also the authorities in the margin.

3 Wils. 345.  
2 384.

But as to Courts of general jurisdiction, it is a rule that the Sheriff may justify an arrest, on a writ which issued from Westminster Hall even though it is void on the face of it. But this rule must be taken with a qualification, he may always justify such an arrest except where it appears from the face of it that the court has not jurisdiction of the subject matter, in that case he can't justify the arrest.

10. 10. 76.  
6. 10. 54.  
3 Wils. 345.

Lecture May 4<sup>th</sup> 1810.

With regard to this subject our courts in Comm: have established one universal rule, that an officer executing process is justified in all cases unless the process is void upon the face of it.



It follows then that although the court have not jurisdiction of the subject matter, the officer is not liable. As the case may be the court and the money also may be subjected.

The officer has no means of knowing except from the face of the process whether it is void or not. According to the rules of the common law if the court proceeds having jurisdiction in reverse order, or irregularly, if the process is regular the officer is not liable. The only difference between this rule and ours is, that this requires jurisdiction of the cause, ours does not.

From what has been said it appears that where the subject matter is not within the jurisdiction, whether the court be of general or special jurisdiction, the process is void and the officer is liable. Where want of jurisdiction goes to person or place, the officer is not liable, unless the defect appears on the face of the process.

2169 110  
182

2. Wilt. 387.

4. 710

2. Wm. 23.

3. Dec. A. 333

2. M. Kelly 488.

3. Wilt. 345.

Bull. V. 88.

This applies as laid down only to mesne process; 175  
if it is upon final process the officer in  
justification must show either that the cause  
of action arose within the limits of the court's  
jurisdiction, or that it was so laid in the  
declaration. This will not justify the origi-  
nal Plff and if he is sued for bringing his  
action in a court of limited jurisdiction,  
he can only defend by showing that the  
cause of action did actually arise within  
the limits of the court's jurisdiction. He is  
bound to know the extent of the court's ju-  
risdiction, the officer is not.

Br. J 314  
Bul. A. 83.  
17. Cent. 369.  
5. Bac. 170.  
2 East 260.  
L. R. 236.

In some cases when the jurisdiction of the court  
is complete as to subject matter, person, and  
place - the process may be void, and the court  
as well as party may be subjected notwithstanding  
the case may be the officer executing it.

As to courts of limited jurisdiction it is a  
rule that where "the authority" is given by Stat.  
and that authority is not strictly pursued



The proceedings are void - as the Stat. in Eng<sup>d</sup>  
concerning game, authorizes a justice to com-  
-mit a person, provided he has not sufficient  
effects to pay - A person was committed,  
having sufficient effects, and he, <sup>the justice</sup> was subjected,  
but the officer was excused, because it did not  
appear on the face of the process that he had  
effects. - So when a person was convicted on a  
stat. and offered to pay the penalty but the  
officer detained him till he paid his fees,  
but as here was a special authority to a court  
of limited jurisdiction, the constable was  
liable. Process is many times void for what  
is called in law irregularity. The Officer in this  
process is liable, but the judges are not, nor  
the officer if the court has jurisdiction. The  
Officer (as was just observed) is liable even upon  
process issued from the Superior courts of  
Westminster. Thus if a capias issues return-  
-able to the next term but one - it is void,  
because if it was otherwise, that is merely

Mu. 712.  
8 Coke. 114  
Jalk. 408

12th 153.

230. 21235  
1141

whereas, the Plaintiff might on the same principle 176  
make it returnable ten years hence, and his  
claim against the Defendant remaining in doubt,  
he must be committed or be held to bail, such  
would be the deplorable consequence of a con-  
tinuing no: crime.

3. 10. 1. 341.  
45.  
2. 31. 2. 845.  
3. 10. 1. 341.  
10. 10. 1. 315.

If the process has issued from one of the supe-  
rior courts of Westminster-hall the officer is  
not liable. The mandates of those courts are  
not questionable by any of their officers.

3. 10. 1. 341.  
2. 31. 2. 1193.

When the original arrest was lawful yet from  
subsequent oppression the officer, magistrate,  
or Plaintiff as the case may be are liable, because  
it is a rule that if the law intrusts a man  
with power, and in the exercise of it, he is  
guilty of any misfeasance, he is a trespasser  
at law. When a person is liable in an action  
of trespass that he acted in an official char-  
acter, proof that he actually exercised the  
office is sufficient to prove the fact, he need  
not show his appointment.

15. 10. 1. 336  
2. 31. 2. 332  
The 10. 1. 5  
3. 10. 1. 632  
4. 10. 1. 666  
2. 10. 1. 666  
= 435-6



An arrest founded on a process under an irregular proceeding is void, that is as to the P<sup>l</sup>, it is still a justification to the officer. Thus if the P<sup>l</sup> has execution served after judgment has been set aside, he is a trespasser, but the officer is not liable.

1<sup>st</sup> Mar. 589  
2<sup>nd</sup> Mar. 589  
1<sup>st</sup> Dec. 93.  
1<sup>st</sup> Dec. 155  
1<sup>st</sup> Dec. 155  
3<sup>rd</sup> Dec. 128  
2<sup>nd</sup> Mar. 993. 4  
6<sup>th</sup> Dec. 891.

But process the erroneous will justify an arrest. It answers every purpose of justification as well as legal process. The party may justify on it, & if execution is served on the Def<sup>t</sup> arising from an erroneous judgment. An erroneous judgment will support an action of debt, but a void judgment will not.

1<sup>st</sup> Mar. 589  
3<sup>rd</sup> Dec. 155.

There is no definition in the books of irregular process or irregularity, nor can I give one, it is only to be learnt from examples. Irregular process is not a proceeding as may be set aside in a summary way. Process to be irregular is of various kinds. 1<sup>st</sup> When not fitted up by regular authority. 2<sup>nd</sup> Where the process had issued informally. 3<sup>rd</sup> It has also been

2<sup>nd</sup> Dec. 47.  
3<sup>rd</sup> Dec. 529.  
2<sup>nd</sup> Mar. 113. 4  
1<sup>st</sup> Dec. 585.

Holden that a writ is not returnable on 177  
a day certain as at the next court. it is in-  
regular. This applies only to mesne process. *7 Bro. J. 314*  
one case the rule has been denied as appli- *2. Buhl. 36.*  
-cable to mesne process, if the day on which the *1. Wms. 81.*  
court is to be holden can be ascertained. *6. Wms. 20. 1. 2.*  
That if process is made returnable to either *2. Wms. 58.*  
our superior or county courts - at their next  
it is not irregular, for the terms are fixed  
by law and are certain.

### Lecture c May 9<sup>th</sup> 1810.

Arrests under general search warrants are il-  
legal, and so are general warrants of every kind.  
Also a general search warrant commanding an  
officer to search "any where and every where" for  
stolen goods is void and illegal. So also a warrant  
commanding an officer to search any where and  
every where for a Libeller is illegal and void. *1. Hale 150*  
*2. Wms. 275*  
*Wms. 213.*

The requisites to search warrants are, 1<sup>st</sup> That  
they be granted on oath. 2<sup>d</sup> The party making  
oath must state the grounds of his suspicion



3<sup>d</sup> It must be executed in the day time by a known officer in presence of the complainant, the other process may be executed in the night-time, and lastly, it is required that the warrant be directed to some particular place or places, they must be specified. These requisites being all complied with, the informer is justified or not by the event of the search, for if they are not found he is liable as a trespasser, and if any of these requisites are omitted, and he still finds the goods, he is liable as a trespasser.

2 Wils. 291-2

#### Mode of justification.

When an officer justifies an arrest under a process, he is to show the process itself, and if his return process that is returned, if the return day has arrived. The reason why an officer must show that the return process is returned is that a return is necessary to consummate and validate it. The Def<sup>t</sup> has nothing to answer till the writ is returned.

S. Co. 52.

2 R. & H. 563.

2 Phil. 1184.

But in final process the officer need not show

The return to final process is a returnable one. 178  
The object of mesne process is to compel the appearance of the Deft and this is not affected unless the writ is returned.

But in final process this is immaterial. The Deft whether he ever returned or not, except as the case may be, he may at some future time want a copy of the judgment &c. So a return in this case is not a commencing act; for Plff gets satisfaction as well if the final process is not returned as if it be. But in mesne process there must be a return, for unless there is the Plff has nothing to answer to us was stated before.

5 Co. 90.  
4 Co. 07.  
2 Co. 20.  
1 Wils. 17.

But to the rule just laid down as to officers showing a return of writ in mesne process.

There is an exception in Eng.<sup>d</sup> in case of under-sheriffs. They act in name of Sheriff, and have by law no authority to make return in their own names. So in justifying an arrest under mesne process, they need not show a return, or they have no power to make one.

5 Co. 90.

But where the Plff in the original process is sued



18.9

we must show judgment as well as because if he  
proceeds, he is privy to that judgment and must  
show it, and also show that his conduct would be  
satisfied.

438.9

It is the rule is the same as to a stranger who jus-  
tifies under final process.

If a Sheriff in making an arrest under process  
omits to make a return of the writ, he  
is made a trespasser ab initio.

Now this case seems contradictory to general rule  
on this subject viz. that no person shall be made a  
trespasser by relation for non-attendance unless it is  
for omission. Now the true ground why the officer  
is made trespasser ab initio, here is that where  
he omits to do that which will complete and  
consummate the original act, he shall be made  
a trespasser by relation.

2. 1. 32

1. 1. 32

5 Dec. 152

2. 1. 33

When different parties are sued together they  
may have different justifications.

If the officers are sued together they may  
sever in pleading.

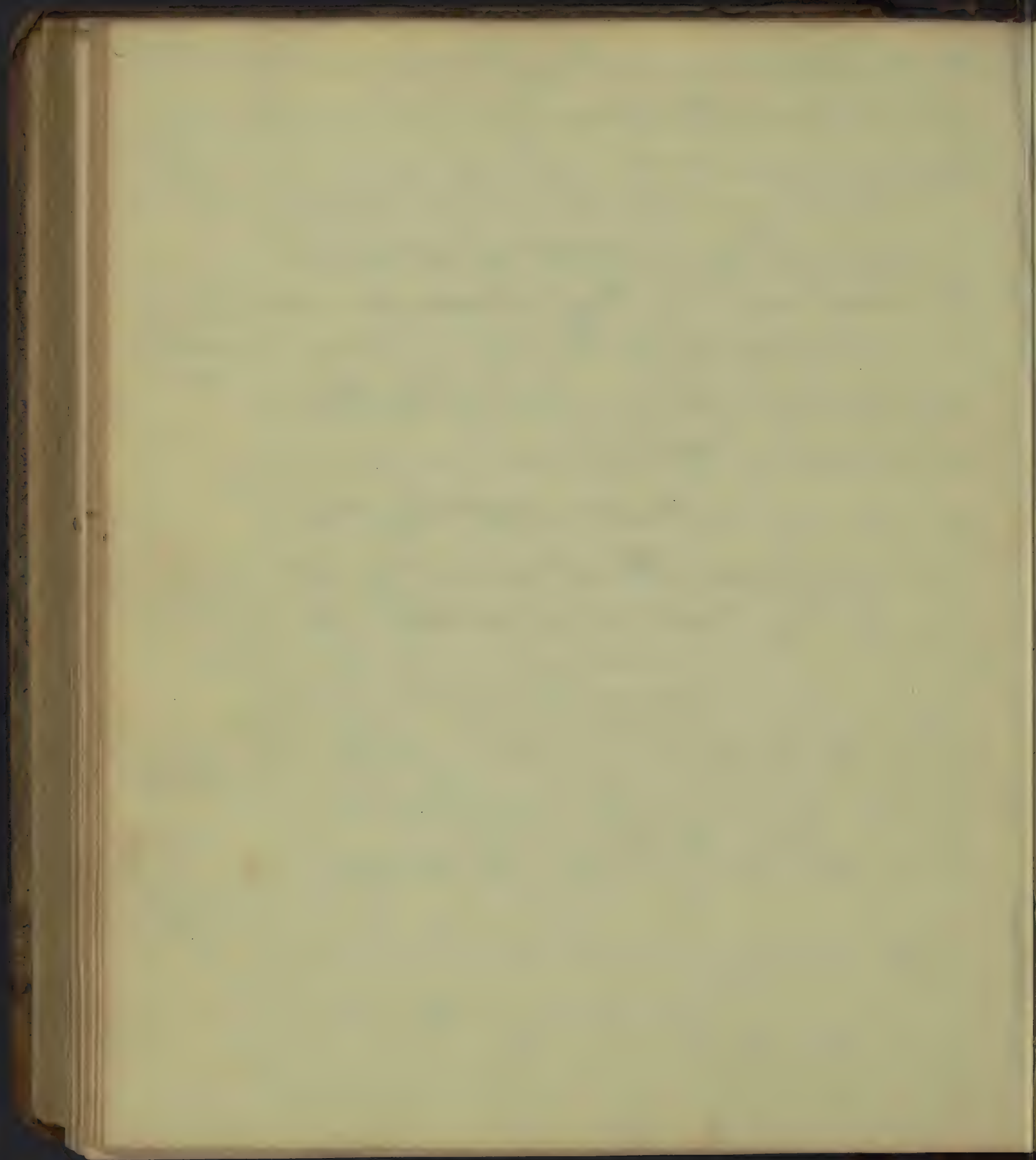
but if they be in a plea and one is convicted 1774  
both will be, if the plea is laid for part it will <sup>1144</sup> <sup>507</sup> <sup>12th 17.</sup>  
be so for all.

In this as in all other cases of Treppass, aiding,  
abetting, assisting or commanding will make a  
principal - and every thing which would make  
one an accessory before the fact in felony, will <sup>1144</sup> <sup>507</sup> <sup>12th 17.</sup>  
make him principal in Treppass. In these are  
no accessories in Treppass.

If A imprisons B and gives the key of door  
to C, who knows of B's imprisonment, and C  
keeps the key, he will be a principal. <sup>5th 1777</sup>

The procuring a Sovereign Prince the influence  
of fear, by threats &c to imprison wrongfully  
a person in his own dominions is false im- <sup>23d 1773</sup> <sup>1055</sup>  
prisonment in the party procuring it.





# Trespass Vi et Armis on Personal Property.

This action is brought for an injury to a person or his property by a direct act of another, and this must be by a misfeasance. As to property it extends either real or personal. Trever and this action are many times concurrent. The taking away by a wrong act is a trespass and a conversion. But if there is a destruction of property without amotion, it is only trespass. Trespass is not always concurrent with trover. As if goods are bailed, and the bailee refuses to give them up, here is no trespass, but a non perance. Sometimes the act is a lawful one, there trespass vi et armis will not lie, but if consequential damages ensue the action of trespass on the case must be brought. In a case of putting a spout so that that the water is carried on to a neighbor house or pavement, it is said that only trespass on the case will lie,



but upon technical reasoning. <sup>heppass</sup> I conceive that  
an action of heppass vi et armis would be  
supported for a man's land in law extends from  
the centre of the earth to heaven, therefore a  
heppass may be committed as well in the air  
over the surface, as upon the surface itself.  
There must always be a nonfeasance, to this there  
is one exception stated in the books. viz. If an  
<sup>officer</sup> goes with a writ and attacks property, and the  
creditor apprehending he can't support his  
writ, prevails on the officer not to return the writ,  
Here they say the action of heppass vi et armis  
will lie for a nonfeasance in not returning the  
writ. I view it however in this light that no  
man can ever take property unless by process,  
but this writ can never be shown in court,  
because it can never be shown except by return.  
Therefore the officer is in the same situation as  
any other heppasser. Concerning the distinction  
with regard to voluntary, and involuntary  
injuries. There does not appear to be any neces-  
sity for the exercise of writ to support this

## Trespass 161

The truth appears to me to be, if the thing done by a person not in the true exercise of his volition would be wrong in case he did exercise his volition, he is liable. But where they are excused it goes on the ground that it was not a misfeasance. A person is in the pursuit of a lawful act, and involuntarily, with the exercise of proper care, does an injury, he is not liable. So that all persons are liable where the act was unlawful, or being lawful due caution is not used. Polham. 161 4 Burr. 2092

An mistake will constitute an excuse, the act itself is an unlawful act. As if J. Miter supposes his land to extend further than it does, he cuts timber upon it and improves it as his own, upon measuring it they find it to be Aker's land, Miter 3 Lev. 32 is liable in trespass.

When a person has obtained the possession of goods.

If the possession was obtained lawfully, as by authority of the owner trespass vi et armis will not lie, but action on the case will provided he refuses to deliver or impairs them.

But where there is fraud in obtaining possession



Trespass

Then he is considered as a trespasser ab initio  
if man hires a horse to go to Salisbury, but  
the subsequent <sup>conduct</sup> of the man shows that  
his original intention never was to go to Salisbury  
but to run off with the horse to Canada, he is  
liable in trespass vi et armis, and as the case  
must be to it with amount to theft.

3 B. & M. 340  
10 Co. 46

If a licence which the law gives, as that an of  
ficer may enter on lands to view an exclosure, is  
abused by any misfeasance he is considered as  
a trespasser ab initio. But a non feassance  
will not entitle to the action of trespass vi  
et armis. A man may take up cattle stray-  
ing but has no right to use them. If he does  
he is guilty of a trespass vi et armis.

5 Co. 146.

10 Co. 147

A man to support this action must have a  
possession, either general or special. In case  
of personal property the general property is  
sufficient. But if Miles has bailed goods to  
e Vokes, and White takes them from e Vokes  
who shall bring the action? The man who has  
the general property may bring an action and

## Trespass

181

and also the man who has the special property may have his action for special damages only. But suppose the special property man brings his action first, can the other have an action? He for the special property man in such case may recover the whole, both the value of the property, and his own special damage, but he is liable over to the general property man.

But sometimes the special property man is not able to pay over - why then is this allowed? It is said in the books because he is answerable over, but he is not in all cases, as where he has used due diligence. The true ground I conceive is this owing to a special case which the law takes of a special property man. He may be liable and he may not. On account then of the nicety of the question whether he has used due care or has been careless, he may maintain the action.

2 Inst. 214.  
 Rep. 5.  
 1 Id. 413.  
 2 Id. 569.



Suppl.

## Lecture & May 7<sup>th</sup>

There is a distinction between personal and real property. In case of personal property the special property man can never bring an action of trespass against the general property man. In no case for this rule, for a special property man in real estate may maintain trespass against him who has the general property. I see no principle to warrant the distinction. In real property there must be an actual possession to maintain the action, but a mere intending possession is not sufficient. There must be a feudal possession, or one equivalent to it. If there is a tenant in possession, his possession is that of his lord. Suppose Hiles dis- seizes & takes, and enters under a false claim of title - Hiles can't maintain trespass & takes. In Connecticut we require no actual feudal possession, therefore a man may maintain an action

See 209

Read 546.

Trefhafs 183

of trespass unless there is an opposing proposition,  
even if he has not seen the land.

It is a general law that a man cannot be  
broken by an officer either to obtain his house  
or to levy in execution. This refers only to his  
mansion house not shop or barn. Reason is  
that it would tend to disturb domestic tranquillity,  
a person escaping from his own house so that  
if a thief will not be secured by this law,  
nor will the man himself after he has been  
taken and escaped. If outer doors are open,  
since ones may be broken. Suppose an officer  
breaks an outer door, and enters and finds goods,  
can he levy on them, or take the man's body. That  
is will it be a good levy? It has been said  
by respectable authority that it will, that the  
injury is past, for which he is answerable, but  
I apprehend that no man can take advantage  
of a breach of the salutary regulations of society.



## Trespass

2 Co. 91  
Cant. 1.  
H. 2. 23.  
Cant. 1.

It tends to lay temptations before men to break the laws. The case cited from Cooper is conclusive against that from Coke, and I think is correct. It is the best case on the subject of outer and inner doors.

Suppose a Sheriff has an execution against a Voter and levies <sup>by mistake</sup> on the property of others? Sheriff is answerable in an action of trespass. But the Sheriff is never obliged to levy on property where he has any doubt. But suppose the Plff orders the Sheriff to levy on this property, in such case the Sheriff may have his remedy over against the Plff. This has been denied, but I apprehend without sufficient reasons.

1 inst. 35

This is not the species of illegality which the law refers to. If a ministerial officer mistakes and commits a person to prison - he is liable, the Jailor is not. That rests on the ground he made the first mistake.

Co. 176.

If an officer knows goods to be another person's

and yet attacks them in consequence of the 184  
deceit he intended by him, he will then be liable  
at all events without a remedy or loss of re-  
-based judgment. Still gets execution against  
Vokes and takes his property and sells it at the  
post and gets his money, a writ of error is then  
granted, brought and judgment is reversed. Vokes  
then wishes to sue Stiles in trespass. But this he cannot  
do for the judgment is reversed, still Stiles may  
show the judgment as the authority under which  
he acted in action of in debitorship with him  
and recover back the money, as money had and 1 Wils. 55  
received to the Plff use of the Vokes.

If the goods of the testator are taken away  
before the will is proved Ex. may maintain 2 Sac. 164.  
1 B. 41208  
1 term 400.  
his action after proving the will.

He has by relation a constructive possession from the  
testator's death, his right is from the will not the  
probate. So also a legatee of specific goods  
may maintain trespass for taking them after  
probate is absent, tho it be before the delivery to



# Trespas

9 Dec. '14.

him by the Executors. Aliter if the legacy had been a third part of the testator's goods, for this is not specific. And in the last instance Mr. Moore suggests that trespass would not lie if the taking was before the executors' appointment to the legacy. In trespass to goods taken &c and belonging to two, both should join in the action but the defect is curable only in amendment.

17 Jan. 480

11 Jan. '2.

Lake 52.

Nov. 26-

Feb. 3.

17. 540.

Jan. 520.

This action does not always lie against the representative of the trespasser in several instances, as assault and battery, slander &c. it never lies, as the right of hot chase is as to action does with the person. But for injuries to property, to somewhat different, here some action will lie, the most in civil actions. The old common law was that no action would lie against Executors for injury done to personal property by his testator. But the Stat. of Edw. 3. gives an action against an Executor where goods have been carried away, but extends no further, so that a tort

13. 530.

goes and finds it has been in his trespass 185  
own field, no action lies against Executor for  
it. So the principle is that some action will  
lie against Executor if his agents have been em-  
ployed which will always be presumed if the  
property was carried off. I should suppose the  
rule ought to be if the Offs property has  
been injured the action ought to be maintained.  
It is not so in Stamby & Trunk case in Comper.  
Not so on the other hand, for Executor against the  
injured party can always maintain trespass 1274  
against the injurer, if he is living trespass 1274.  
now however will lie for servants of any kind.  
If a dog does mischief, he must have been accus-  
tomed to do mischief before, or the master  
is not liable. So also if an ox goad, the mas-  
ter's liability depends upon his knowing whether  
he goads by accident, or whether by his character.  
Where a man's property is taken away, owner has  
a right of redemption, and it will not be trespass  
in him to go on his neighbors land to retrieve it.

4 Co. 34.  
Cro. 454  
2m. 25  
2d Co. 608



## Trespass.

3064

But it should turn out not to be his, he will be liable in trespass. But he may not disturb the peace in retaking the property.

It seems at common law that trespass does not lie for an act amounting to felony, as Robbery. Grand-larceny &c by reason of the merger. But you may commence an action of trespass before he is publicly prosecuted. The reason why you can't afterwards do so, because forfeiture is the consequence of felony, therefore he has nothing to make satisfaction with.

5 Bac 170

1 Rev. 2, 47

1 Com. 136

- 582.

1 Id. 375.

2 Id. 557.

1 Mod. 233.

reg. 52

Lect. 344.

Id. 873.

22 Bar. 1572

1 Term. 176

Bul. 13.

English authorities are contradictory as to the application of this rule. Merger is founded on forfeiture it seems.

Don. 43

In connect<sup>n</sup> as there is no forfeiture I think trespass would lie notwithstanding the public prosecution. If a thief takes the goods of one person against another. Plaintiff is liable in this action. If after are found damages payable you may either detain them till you get your damages or

You may sue in trespass, but cattle so distrained may  
be recovered.

Co. Lit. 142  
5 Co. 76.

You can't distrain for rent in Connecticut +

The declaring the goods must be described with  
concreteness certainly - so "divers goods" or "P'ss goods"  
is not sufficient, nor will it be ruled by verdict.

Op. 2435

or one recovery would not be a bar to another in  
that case, and Deft. could not justify.

Do. R. 1410  
Ann. 2435  
Sha. 637  
5 Co. 35.

But this rule applies only when the action is  
founded on the taking or injuring the goods  
themselves, not when the injury is laid by way of  
aggravation - there P'ss goods generally is suffi-  
cient. E.g. Trespass for breaking and entering  
P'ss house and spoiling his goods, is sufficient  
even on general demurrer.

Op. 406.  
3 Co. 292.

Trespass for breaking and entering his house and  
spoiling P'ss - extending is only an aggravation  
unless P'ss makes a new assignment of it as a tort -  
fraudive trespass.

1 Co. 230.  
3 Co. 292.  
12 Co. 55  
11 Co. 211.  
217  
2 Co. 313  
3 Co. 20  
4 Co. 12

A general description is sufficient if it is made par-  
ticular by references to other things in the doc.

Op. 406.  
1 Co. 643.  
11 Co. 114



# Trespass

2. 1. 116 = location. Trespass of a permanent nature  
1. 1. 135  
2. 1. 259. may be laid with a continuando.

8. 1. 405 Laying with a continuando, when the act lies not  
1. 1. 6. 19 in a continuando is not cured by verdict, unless  
verdict is in continuance.

2. 1. 406 Plff must state a trespass "proper" showing a  
1. 1. 410. right of possession i.e. either an actual or a  
constructive possession, or Plff possession is not  
2. 1. 40 sufficient. Taking hay from Plff's land is not  
1. 1. 490. sufficient - the declaration in these cases is not  
2. 1. 156. good even after verdict.

2. 1. 407. Value of the article must be stated.

1. 1. 119. There is it not to aggravate the damages. ante up & batt.  
1. 1. 61.

2. 1. 317. Day laid not material. Plff may prove trespass  
1. 1. 642 at any time previous to the action brought,  
1. 1. 1032 not within the Stat. of limitations. Therefore if a  
2. 1. 407. 321 release is pleaded Deft must traverse at subsequent  
1. 1. 415 time.  
1. 1. 17.

2. 1. 321 If a trespass has been committed by several, Plff  
1. 1. 293 may declare against one, or more or all - so also  
2. 1. 8. 32 against each one separately.  
1. 1. 15  
2. 1. 415  
1. 1. 106  
1. 1. 98  
2. 1. 192  
1. 1. 420.

Trespass 137

If on a judgment against several one is compelled to pay the whole, he can't oblige the others to contribute, and this rule is applicable to all torts. But if it appears from the declaration, that the Deft with another certain person committed the trespass - the Declaration is ill for not joining the latter. As to this principle torts being several, and the Deft showing the fact, does not hurt the declaration. at least if the latter is not known.

Ind. 114  
9 Term. 180  
Kilg. 110

5 Bac. 92  
1 Leon. 41  
Hort. 99.

re. 420  
Hort. 199.

Est. 411  
Lil. 282.  
Ma. 61.

Est. 421.  
Ma. 610  
Hort. 54  
Lil. 1572

Justification must be pleaded -  
If the justification pleaded by one of several, shows upon the whole that the Pff had no cause of action - judgment can't go against either, even if one is defaulted, or found guilty. E.g. licence pleaded or gift &c.

Words *vi et armis*, are not necessary to be stated in the declaration in connect. Bosworth & Phelps, in case cited there was a special demand.

In Eng. l. words *vi et armis* are words of substance. For at common law the judgment in case of forcible injuries was a *capias pro fine*, taking out



# Trespas

7 Bac 11

3 Co. 29.

5 Pl. 408

5 Bac. 191

alk. 636

6 Pl. 417

6 Pl. 443.

526. 506.

the original, and the judgment was a misericordia.

Prisoner after the judgment:

Now a writ of capias pro fine, is taken away by Stat.

5 Wm. M. but the Plff pays a substitute on the signing judgment; in actions for injuries with

force viz. 6/8. Therefore the reason of the rule

still continues.

So contra pacem are words of substance in Eng.

These defects are aided by verdict, and shall be amended.

5 Bac. 191

alk. 36

5 Pl. 985.

5 Bac. 192

Pl. 408.

alk. 636.

Pl. 408.

alk. 540

Stat. 16. 17. Can. 2

Decided nearly 30 years ago in Connecticut, that Trespas & Tresp. on the case might be joined in one declaration - no late decisions.

At common law such a joinder would be ill because different judgments would be necessary.

Now the capias pro fine is taken away by Stat. 5 Wm. M.

yet the general criterion has still been the difference or sameness of the judgments.

8 Co. 37.

2 Pl. 321

2 Wm. 319.

2 Wm. 322.

1 Term. 274.

Case for misfeasance, if not vi et armis and negligence, may be joined with Trover. Tresp. vi et armis, & Trover can't be joined it seems.

In Common Law the rule as to torts may be different as to the two causes of action.

2 Driff. 268

Justice Buller says that the identity or difference of the judgments is not an universal criterion but he says where the same plea i.e. the same general issue is proper and the judgments would be the same the causes of action may be uni-

1 Term. 274.  
4 Do. 347.

versally joined. (By the same judgments is meant the same judgments at common law,

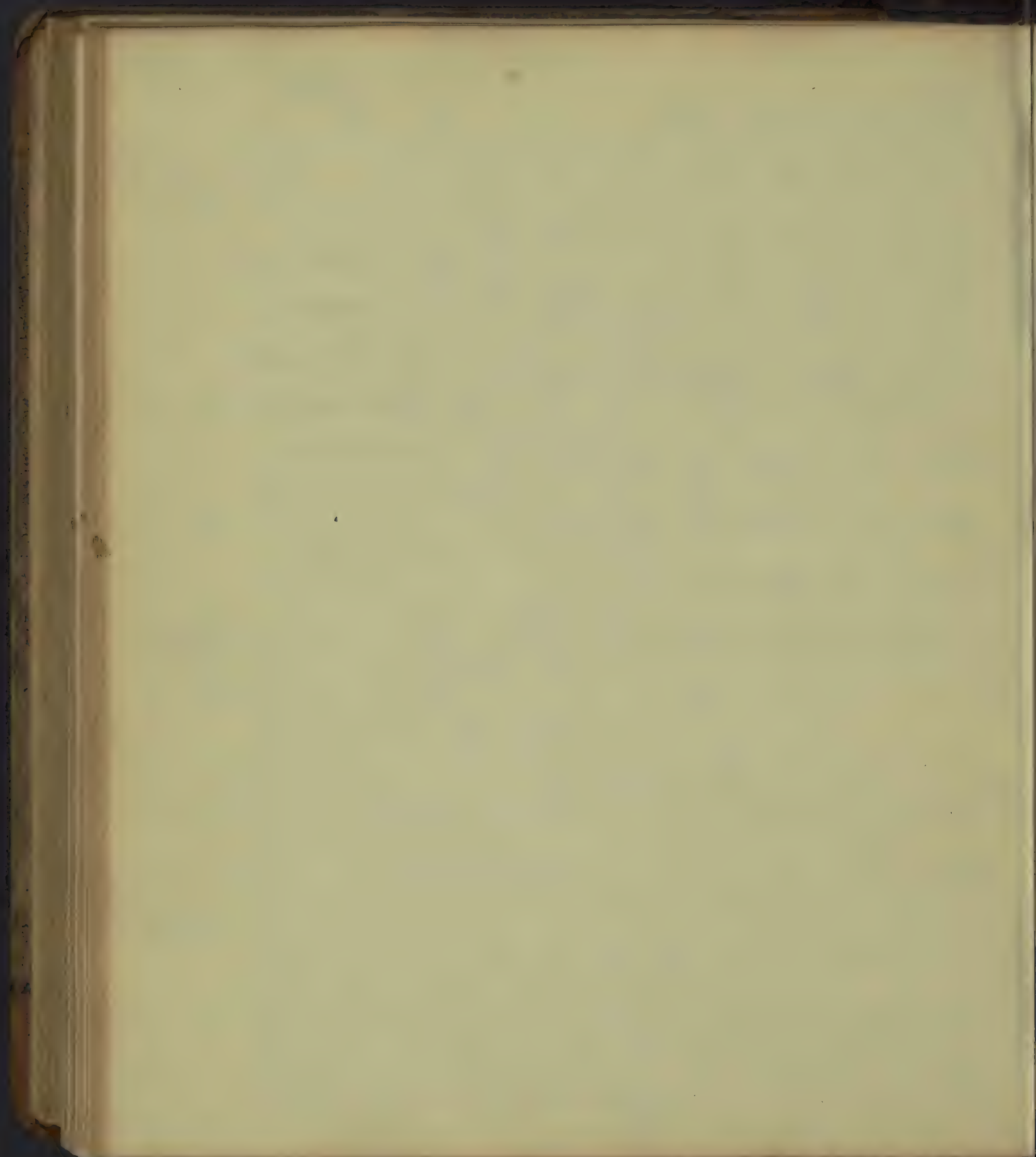
3 Bac. 191.

before the State of W<sup>m</sup> & Mary.

Contract and tort can't be joined.

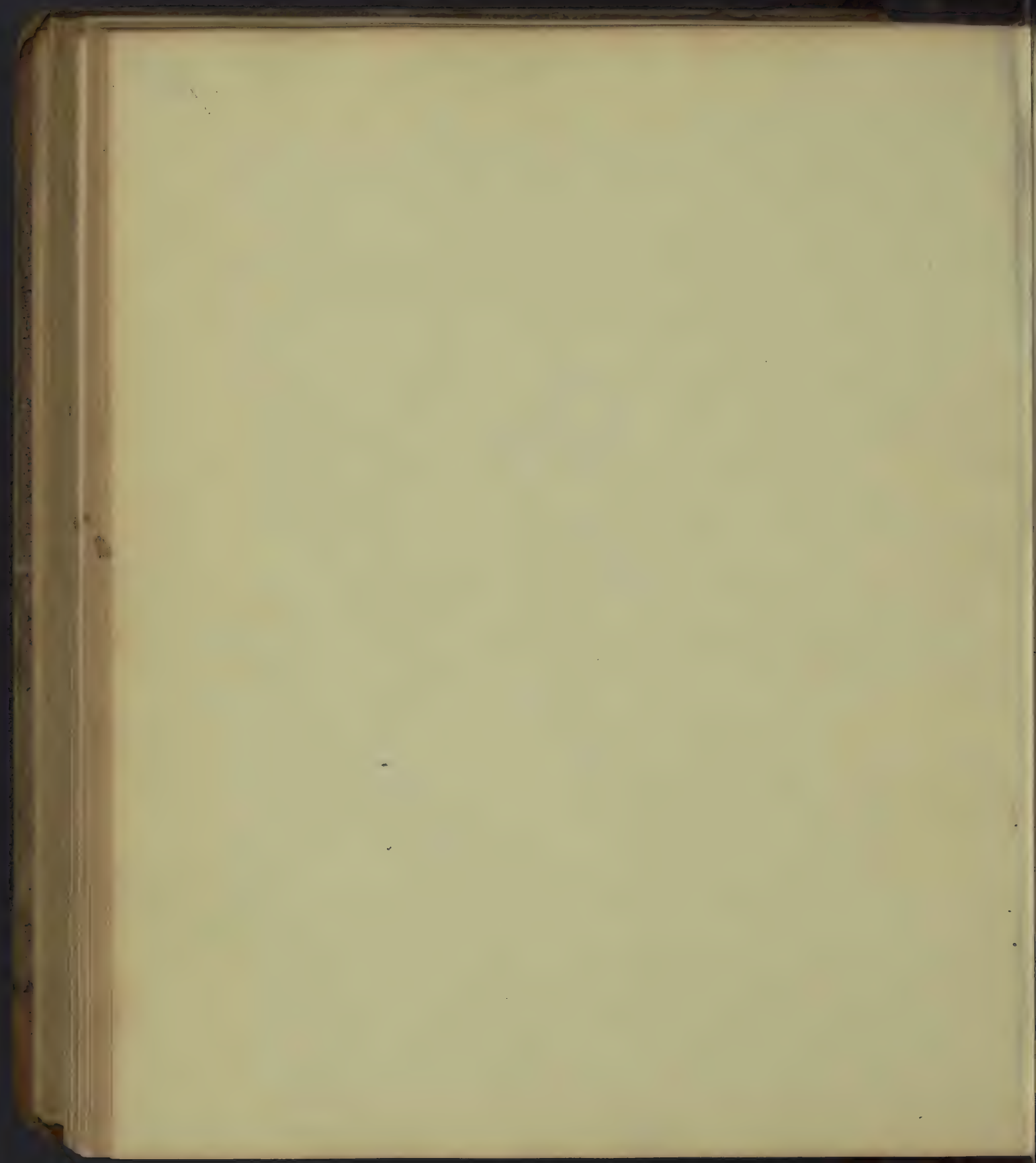
1 Term. 276  
Gro. 10  
4 Bac. 11





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## Action of Tresspass on the Case.

I am not about to treat of all actions on the case. The object of this title is to give the general outline of the action arising ex delicto and not as sounding in contract.

I shall consider tresspass on the case arising ex delicto, for injuries to the person and personal property of another.

It has been frequently said that Tresspass on the case lies for wrongs unaccompanied with force, but this is not a complete description of the action.

I think a true description of this action is that it lies for wrongs unaccompanied with force, and for consequential injuries which are occasioned by acts which are forcible.

As to wrongs <sup>non</sup> accompanied with force, it lies in case of malicious prosecution, slander, libel, &c. so it lies for nonfeasance, as against Bailees,



against Master, for neglect of servant &c.

2<sup>nd</sup> It lies for consequential injuries which were occasioned by acts which are forcible.

Thus it lies for these wrongs which are occasioned by a free good. As if one beats my ser-

382.122

843.598

776.630

522.1349

11492.

282.895

-vant or child, here the acts were forcible, but my action is brought to recover consequential damages.

Actions of trespass on the case are regularly founded on the equity of the Stat. of Westm. 2<sup>d</sup>. The 1<sup>st</sup> said there were actions of trespass on case at common law.

386.

The general provision of this Stat. was that if a party who was injured could not find a form of action in the Register, he might bring an action on his case. This is one of the most important and beneficial Statutes ever made.

3. Rec. Hist.

Eng. Hist. 89

243

The forms of declaring in Countess have made a difference between an action on the case & an action of trespass on the case. If the act founds in fact we call it trespass on the case

but if it founds in contract only, we then call 191  
it an action on the case.

There is no such distinction known to the Eng. 3 Haver.  
law.

## Lecture May 9<sup>th</sup> 1810.

Where there is no force in the original wrong  
complained of, there is no difficulty in finding  
the action, 'tis clear perhaps on the case is the  
proper remedy. But where there is force there  
is difficulty, sometimes in determining, whether  
perhaps on case should be brought. Sometimes  
one will lie, sometimes the other. The rule is  
if the original act was immediately injurious,  
perhaps is the proper remedy, but if the injury  
is consequential, perhaps on the case. Many  
cases have furnished great controversy in de-  
termining the application of the rule.

If my servant is beat, and I lose his services, I  
must bring perhaps on the case, he will have per-  
haps if it arises, for my damage is consequential,

3 B.L. 205.9

Butt. N.P. 26.

79

John. May. 407

2 Lick. 313

2 B.L. 1055

2 Burr. 1114

2 Term. 231

5-80-648

6 Term. 125

- 153-



this is immediate. For the purpose of maintaining  
trespass, it is not necessary that the injury should  
be the instantaneous effect, but if it is the direct,  
necessary, and physical effect of the act is suf-  
ficient. The only difficulty, as was observed before  
is to discover when this is the case, or what is  
immediate and what consequential effect. If the  
injury is by a train of necessary effects, trespass  
will lie. I have endeavoured to establish a rule which  
will be a pretty correct criterion, to determine  
what is immediate and what consequential.

When the immediate or proximal cause of the  
injury is but a continuance of the original  
act of force, and is not by any means produced  
by the ~~extraneous~~ intervention of a voluntary  
agent the injury is deemed to be immediate, &  
he is liable in trespass; but when the original  
force ceases before the injury complained of  
commences, the injury is said to be consequential,  
and trespass on the case lies. When one of these  
is proper, the other cannot be brought, tho' it

2  
has been said otherwise by one or two judges, but  
when one is proper, the other is universally wrong.  
Explanation of the rule laid down. If A shoots a  
ball at a tree, and it glances and hits B, B  
can maintain trespass. Here altho the tree gave  
the ball a new direction yet there was no inter-  
vention of any voluntary agent, the only agent  
is it and the force at giving the wound is but the  
continuance of the original force. Suppose A puts  
a football in motion, and B kicks it so that it  
hits C here there is a new agent and a new force  
improp. D. B only is liable in trespass. A man dis-  
charges a gun at a mark and after glancing  
several times it hits the servant of B, the  
bodily hurt is the effect of the immediate cause,  
therefore action by servant is trespass, the force is  
continued the diverted, but the master must main-  
tain action of trespass on case. The servant  
could <sup>have</sup> maintained his action, so instantly when the  
injury happened, the master could not because  
his injury is only occasioned by lapse of time,



2 J. 1678

Salk. 101.

5 J. 274.

— 531

in which he can lose service. The original force is  
the causa causans, the servants doing the causa  
causata.

Suppose C throws a log into the highway, this is  
an unlawful act, and it may be convicted for it,  
and after lying sometime B's carriage is broken  
by it. B's remedy is gone, for the force had ceased  
before the injury commenced. Here the damage is  
consequential. But if C had thrown the log  
against B's carriage, and broke it. B's remedy  
would have been perfect, for the immediate cause  
of the injury is a continuance of the original  
force used.

5 J. 648

— 636

Again Suppose a man wantonly turns out a mad  
bull into the street and he injures some person, now  
his remedy is perfect. The bull is the mere instru-  
ment of this person, as the same as if he had  
thrown a stone, he sets an instrument of mischief  
in motion, and is considered as the author of the  
mischief.

So if one man cuts a tree on his own land and  
it falls on to his neighbors fence or house, and

injures it, now the remedy is trespass.

Let a man in trespassing at sea, suffer some of the branches to fall onto his neighbors land, the remedy is trespass.

Jan. 21st 1667  
C. 446  
An. 10  
C. 447

But suppose I erect a spout on my building and the water runs from it onto my neighbor's land or house - now the remedy is case and not trespass. For the force comes before the injury commences. The infirmity there is no force here, he has a right to put a spout on his house.

But if it cuts down a bank or head of water, & the water flows on the land of B. and injures it, trespass is the proper remedy.

to break him.

Suppose it rides a wild horse into a field where there are a great number of people, now if one is injured by this horse, his remedy is case. This is not the act of A to assure he is guilty of negligence and that is all. This case is turned on both sides of this question, but I conceive this case has nothing to do with either. For this act was in no way the act of the rider.

West. 295  
2 Bl. 397



2-4-17-  
the 5-  
638-6

Suppose I dig a trench on one side of a land and turn  
a water course from off my neighbors land into  
it the proper action

## Lecture c May 10<sup>th</sup> 1876.

The case of Scott & Shepard in Blackstone Reports  
is frequently referred to, to illustrate this distinc-  
tion. The Defendant threw a lighted Squib into a market  
place, and after several explosions it lighted on a  
butcher's stall, and he in self defence burst it off  
and it exploded, and put out the eye of the Plaintiff.  
Plaintiff brought an action of trespass ag. the person who  
threw the Squib first, and it was decided to be the  
proper action - Just Blackstone dissenting. I con-  
ceive the decision to be correct. The butcher was  
not considered as a voluntary agent.

The first branch of the rule concerning these ac-  
tions, holds only as ag. the party who used this  
force, & by this I mean all persons who assisted,  
aided & abetted, as well as he who was in fact the  
author of the act or force.

Thus suppose a broom in performing

his master's business commits an injury with force, 177-1  
now the servant is liable in trespass, and the  
master, in case, for not employing a more skillful  
servant.

12 East. 100  
6 Term. 125  
5 Do. 649.  
2 New. 447  
1 Inst. 472.

When the injury is the immediate consequence  
of the act, it makes no difference (when action of  
trespass is brought) whether it is owing to his  
negligence or wilfulness.

It has been decided that if C wilfully runs his  
wheel against that of B. Trespass will lie, & so if C should  
carelessly strike it against B's wheel.

8 Term. 195.

If mischief is done by one's dog or other animal, the  
master or owner (when liable at all) is liable on  
case. For the act is that of the dog and not of the  
master.

38 East. 593.

But if a servant wilfully drives his master's car-  
riage against that of another he said the master is  
not liable at all.

It does not hurt a declaration in an action on case,  
with a *pro quod* recitandum assuit, to have force &  
arms stated, they are words of description. Still you  
must not call your action on case, an action of  
trespass.

3 New. Hill.  
249



2 Bl. 892

It is said when the original act causing the injury is unlawful. Trespass is the proper remedy, and whenever it was lawful the remedy would be case. But this idea is now exploded, it all depends on the distinction which I have taken.

2 Bl. 859  
3 Bl. 154

It has been said that case and not trespass is proper remedy, when the original act is lawful. This is not correct, for if A cuts a tree on his own land & it falls on B's house and injures it. Trespass and not case is the remedy, and this is said to be a lawful act, i.e. the cutting of the tree.

1 Bl. 597  
1 Bl. 217.

1 Roll 43  
1 Com. 11. case.

This action of Trespass lies in a great number of misfeasances, and nonfeasances. I have considered some of the misfeasances for which it lies, and will now treat of those nonfeasances for which it may be brought. Of mere neglect for which this action will lie must be an omission of some duty imposed on him by law. So Sheriffs are liable for any neglect in their offices.

A person performing business for another in the line of his profession & doing it carelessly and unskillfully, is liable. But if he is not acting in the

line of his profession he is liable only for carelessness, 193  
and neglect, and not for unskillfulness.

12 Reg. 111.  
2 Wils. 357  
100. 100.

But to this general rule there is an exception in  
case of Surgeons & Physicians, for if a Quack in-  
jures one in his professional business, the party  
injured can have no action whatever, even if his  
cures by neglect.

3 B. & L. 122  
" 106  
1 B. & L. 111  
case.

But this action lies in general ag. any one by  
whose act, or culpable neglect the health of an-  
other is injured off selling bad liquors, or ex-  
ercising a noisome trade &c.

1 Rot. 90. 95  
9 Co. 52  
Hutton 135  
3 B. & L. 182.

For mischief done by ones dog or other animal  
the animal being addicted to this mischief,  
and the owner having knowledge of it - he is  
liable for it. But by our Stat. in Connect. the ow-  
ners of dogs are liable at all events for the in-  
juries done by them.

6 Co. 350  
Salk. 662  
3 Salk. 12

Stat. 238

But if one keeps animals for a nation and they  
do any mischief, the owner is liable, whether  
he knows if they are addicted to it or not.  
neither is it necessary to prove that they have  
ever done mischief before.

2 Reg. 102  
106  
106  
106



But in those cases in which science is neces-  
sary to make the owner liable, his do. in the  
books that the scienter is not traversable.  
Now you cannot do it by a special plea, for  
you cannot adapt a technical traverse to the  
allegation. But by this is not meant that  
you cannot deny the scienter, for you may do  
this by pleading general issue.

4 Co. 18.

10 Co. 345  
5 Bl. 236  
1 Vent. 275  
2 W. 186  
9 Co. 112  
3 Lev. 266

This action also lies for a disturbance which is  
generally a corporeal right, so if one obstructs  
a right of way, this action lies.

Another class of cases in which this action lies  
are those of Escapes.

1. 3 Co. 243  
10 Co. 178

If the Escaper is negligent it will lie only ag. the  
Sheriff, but if he is voluntary it will lie  
ag. both Sheriff and <sup>Escaper</sup> under sheriff. vide title sheriff  
and jailors

6 Co. 141  
190  
25 Co. 313  
13 Co. 206  
2 Co. 561  
8 Co. 146

This action lies ag. one who unlawfully refuses to  
take bail - & if Sheriff on an ex parte process refuses  
to take bail when it is tendered he is liable in  
case -

So also if a magistrate refuses to take bail for a

criminal when the offence is bailable he is liable. 190  
-ble. former edition.

This action lies also ag. Rescuers. It is said in one of the old books that *treppass vi et armis* is the proper remedy in this case, but this is not law. And in case of rescue the jury may give what damages they please. They may give the whole original demand or a part of it.

Bull. 1262  
Br. mod. 211  
Holt 180  
Br. 6. 77  
Br. 7. 119  
8. 7. 127  
Exp. 2. 757  
1657  
B. N. 62.

When the rescue is of a person taken on *mesne* process, this action may be maintained by Plff in that Process but not by the Sheriff, for a rescue is good return in *mesne* process.

But if a person is arrested on *final* process, Plff and Sheriff may have this action ag. the rescuers, for rescue is not good return in *final* process.

Br. 6. 77  
109  
Hutton. 98  
Exp. 2. 610  
4 Bac. 399

If in rescue on *final* process the Plff sues the Rescuer, the Sheriff is discharged.

Exp. 2. 610

This action also lies in favour of a Sheriff ag. the party escaping from him, after an arrest either on *mesne* or *final* process.

Br. 6. 53  
Exp. 2. 612.



## Seclure, May 11. 1810.

Attornies are another class of persons against whom this action will lie for neglect, whereby any injury is occasioned to his client.

An attorney by dishonest practices may make himself liable to his client's adversary. As were an attorney, entered up judgment for his own client, after a nonsuit, by practising fraud on the officer of the court.

Justices of the Peace also are liable in this action for refusing to do their duty, provided any injury results to an individual. Thus for refusing to take bail, or to authenticate an instrument which requires his signature.

But it has lately been decided that this action will not lie against a person, who has sued out a writ against another, for not countermanding it after settlement, unless he did it maliciously. The writ was issued lawfully, there is no legal duty, to countermand it on the part of the Plff. He may live in one part of the

1496  
4 Burr 2060  
2 Wils. 325

Hutton. 125  
3 Wils. 377  
3 B. & C. 165  
1 mod. 209

17 Mack. 26. 90  
1 Hale. 97  
Erd. 618

State, and the Sheriff in another.

13085 P. 388

et another numerous class of persons are Bailors  
of different kinds, in a breach of trust. The action  
lies on the ground of neglect, in all cases of bail-  
ment where the property is lost or injured, by  
want of such care as the law imposes.

197

Generally a bauprit will lie, and if brought  
on the implied contract, this action is waived,  
that is the tort.

220 May 909

46. 93

Just. 99

Talk. 26.

This action lies a.g. owners or masters of vessels  
for any negligence, whereby there is loss or injury  
occasioned to the goods.

Talk 440

8, 12623.

It is holden in the case cited from Talk. that  
where owners are sued, they can't be sued also  
but must all be joined, and that if one only is  
sued he may plead in bar the nonjoinder.  
This is all incorrect and has since been overruled.

3 Talk 263

5 Term. 651

Post masters are not liable for loss occasioned  
by ever the neglect of their subordinate offi-  
cers. Each is separately liable for his own neg-  
lect. There is no privity between the person  
lodging a letter, and the Post master. Besides



alk. 17.  
6ow. 754.  
3wib. 443.

The responsibility would be too great. Reasons of policy. Then would submit the exception to the general rule that, masters are liable for the acts of their servants.

9 Bacc. 179  
Bulst. R. 73  
8 Co. 32  
3 Bl. Co. 165. 6

This action lies against any person for deceit. Innkeepers are also subjected in this action, for all losses of property of their guests, by want of that attention which the law requires.

This action lies ag. any person for deceit, to the damage of another. This is usually committed in contracts of bargain and sale. etc. upon a false affirmation of quality, or a fraudulent warranty. But I consider warranty as coming under "actions founded on contracts" not Torts, there is no need of fraud to support it. etc. An express warranty is an express contract. But false affirmation is properly ranked under this head of deceit, it arises ex delicto.

alk. 211  
Bulst. 629  
1 Cond. action  
can. for deceit.

When the action is brought for a false affirmation, it is necessary to allege, and to show that the Deft. knew that this affirmation was false. There is no tort without fraud, and no fraud without knowledge.

note 230

An action will not lie ag. a vendor when the vendee 178  
has been guilty of any neglect himself in being  
imposed upon. Thus if a horse is sold having a visible  
defect, and there is a general warranty, no action  
lies for this defect.

2 R. 1118  
1 Vent. 64. 110  
10 alt. 24.  
8, 126 29. 30

But the a general warranty will not extend to  
these defects, yet I conceive that a special war-  
ranty will.

3 Bl. 165  
5, 13. 800

When the defect is of such a nature, that altho  
the marks of it may be visible, yet the discovery  
requires skill, a general warranty extends to it,  
as in case of the leaves in a horse.

1 Lord. 2. 1. 1. 1.  
or can for deceit.

As to the law of deceit, the Rule is that a con-  
-cealment of truth is the same in law as an ex-  
-pression of falsehood. *suppression veri &c.*

2 R. 5.  
5, 126 32

And I take the rule to be that when a man sells  
for a round price, the seller is liable, for his prop-  
-erty, to another, knowing of defects, and does not  
make them known, he is liable in deceit.

2 R. 5.  
5, 126 32

It has been settled in Connecticut that when a  
man sells for a round price, the seller is liable  
tho he does not know, at the time of sale, of the



3 Term 759

defect, nor the purchaser. This is a departure from common law.

Where the vendor of property practices fraud by a false affirmation of title, he is liable. But the conclusion from this rule is incorrect, viz that if there is no affirmation, he is not liable, tho there is no title. The truth is the action may be brought on the implied warranty. By the act of sale, he warrants the title.

Bark 90  
Callow 91  
Salk 210  
1 Pontbl. 109  
373  
Cro. J. 474  
Bark 90  
Lo. 12 593  
3 Term 57  
6 p. 2. 682.

3 Term 51  
11 2 East.

vic E 90  
1 Sid. 258  
1 B. & P. 32

Salk 12  
5 Co. 72. 3  
Calk 193.

This action of trespass on the case, will lie for an injury occasioned by a false, and fraudulent affirmation, tho the person making the affirmation is not interested. As if a person says a man is a person of credit, and in that way gets him to be trusted when he knows him not to be so.

It will lie in general for all injuries occasioned by cheating of all kinds.

Where a public right is obstructed to the injury of an individual he may maintain the action. There must in all these cases be special damage.

Stated.

This action lies for all injuries occasioned by a  
nuisance - As obstructing ancient lights. They  
have been decided ancient if 40 years have el-  
-apsed.

199

q. Co. 58.  
3 B. & C. 216  
1 Vent. 239.  
Gro. 8. 118.  
Salt 459  
6 mod. 116.

But if a man sells a house on his own land  
without he nor any person claiming under  
him shall obstruct his lights &c whether they  
be ancient or not. For this would be against  
his own grant.

## Lecture c May 12<sup>th</sup> 1810.

This action can't be supported for obstruction of  
a mere prospect.

q. Co. 58  
3 B. & C. 217

A house built contiguous to the street is, upon the  
side near the street immediately entitled to the priv-  
ilege of an ancient house. & in action there will lie  
immediately for an obstruction of ancient lights.

The reason is that no man is deemed to be foolish  
or improvident in building on the highway  
but this can't be said if he builds on land con-

3 Vent. 401  
2 B. & C. 214

tiguous to another, and so places his lights  
that they may be obstructed.

In case of nuisances one recovery of damages



208 141  
2 Hen. 103

is no ground, why damages may not be recovered for any subsequent injury, from a continuance of the nuisance.

Talk 460  
Croj 378.

The author of a nuisance does not discharge himself by leasing the premises. The action may still be brought ag. him.

croj 378  
555  
Dyer. 250

The action however may be brought ag. the lessee or assignee, if the nuisance is still continued, or he is deemed to concur in the wrong, after he takes possession.

208 237  
325  
4 Hen. 244

An action will lie for obstructing ancient rights, by the lessee for years, as well as by him in reversion. It is an injury to the former in respect to his present enjoyment, to the latter as it affects the sale of the property.

3 Bl. 216  
5 Co. 191  
1 W. 634  
1 Ad. 197

This action lies for overhanging ones house, whether there is any obstruction of light or not.

This action will also lie for erecting a manufacture or other building, from which there is an

208 191  
111  
1 Ad. 89  
9 Co. 59  
3 Bl. 217

unhealthy vapour, or which injures herbage &c. If the air is rendered noisome, and disagreeable, it lies, as for tan works &c.

This action lies on the part of persons standing 700  
in particular relations to others who are the  
objects of immediate injury - Thus Husband  
for beating his wife, a Master, his servant, Parent  
his child, considered as a master - In actions  
per quod servitium amisit, where that is the  
gist of the action, the action is trespass on the  
case. Because force and arms is usually stated  
it is usually confounded with trespass. Espinasse  
has fallen into this error.

There are certain other personal injuries for which  
this lies. Thus for violation of the elective fran-  
chise, as if a vote is refused. 2 Inst. 19  
3 Inst. 17.

So also the candidate may have this action ag.  
the presiding officer if he refuses to take a vote  
for him or refuses to count them. 2 Inst. 25  
11 Inst. 206  
2 Hen. 5 c.  
3 Inst. 21.  
52

The returning officer is also liable to this action  
to the candidate if he makes a false return, so  
that he is not elected. 11 Co. 99

The action it is said will not lie for a false return  
of a member of parliament, unless the right is de-  
termined by parliament in favor of the person



1 Ark. 256

mod. 15

49

1 Ark. 127.

who brings the action. This has been denied by  
C. Just. Willes, and I think correctly, for the Le-  
gisature have no right to interfere in the claim  
of an individual in a court of justice.

In England there is a Stat. on this subject giving  
to the party injured double costs &c

1 Ark. 127

3 Bl. 111

Act<sup>n</sup> lies ag. an officer making a false return  
on a mandamus, by the party injured.

This action lies in favor of an author of any lit-  
erary work, for publishing his works. There is  
now a Stat. in Eng<sup>d</sup> on this subject - limiting the  
author's right to fourteen years, and if he is alive  
at the expiration of that period for 14 years  
longer. We have a similar Statute.

4 Burr. 2403

1 Ark. 739

Ark. 441

2 Ark. 1005.

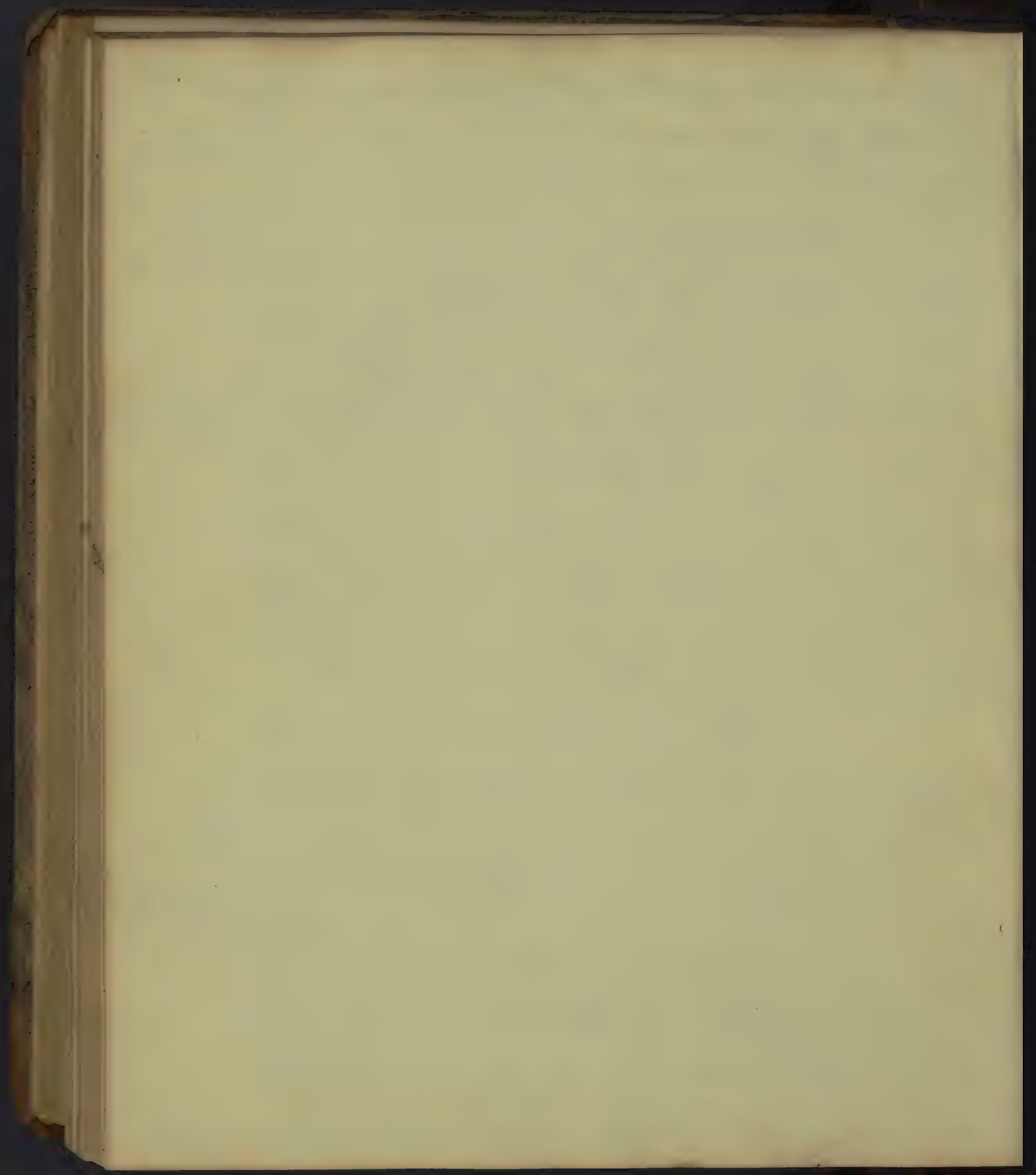
Any person employing another in the trans-  
action of his business, is liable for any injurious  
misconduct in the management of that busi-  
ness.

This action lies for obstruction of process. Thus  
if an officer is prevented by a stranger from  
executing process, he is liable in this action  
to the original Plaintiff, the act<sup>n</sup> however

would not lie ag. the Deft. because he is a right <sup>271</sup>  
to close his own doors. <sup>5 to 93<sup>a</sup></sup>  
<sup>6 to 94<sup>g</sup></sup>

In declaring on behalf of the case, no precise  
form of words is necessary, as in common actions  
Every action on the case is supposed to be foun-  
ded on its own particular circumstances. Any  
words which are tantamount to those com- <sup>Gill. R. 1, 3</sup>  
monly used will suffice. <sup>1 Term. 541.</sup>





# Replevin

Lecture May 14. 1860.

The object of this writ is that when A. attaches the property of B. to respond to the judgment, which attachment is allowed on mesne process, then B may replevy this property so attached and give the bonds of C in its stead. If A. obtains a judgment against B and B does not pay, it may go upon C a responsible man who has given bonds. It is only therefore a mode of supplying A with a security equivalent to what he had before gotten. A question here arises, which I do not find has received a decision - What shall be recovered upon this bond? Suppose A on mesne process did not take security sufficient, as \$50. for a debt of \$100. Bonds are given to respond, and the



goods replevied. Shall the Plff recover of the  
bondsmen the whole judgment viz. 1800s  
whereas he could not without the replevin,  
have recovered more than £50.

I apprehend that he can recover no more  
than the property replevied. The object of  
the security is only to put him in as good  
a situation as before replevy. No doubt  
would have been entertained, but from the  
words of the Statute. But I think that the  
intention of the legislature does not con-  
-tain the doctrine I have laid down.

## Mandamus.

There is a great deal of obsolete learning on this subject. I shall direct your attention only to those parts now in use. —

This writ can only be obtained from the superior courts of law in the country. The legislature have nothing to do with it.

Its object is to afford a specific remedy in certain cases. — 1<sup>st</sup> Where a ministerial officer refuses to do his duty. As to compel a town clerk to record a deed. 2<sup>nd</sup> Where a court has over any inferior court; to compel them to do their duty. As if they refuse to proceed in a case. 3<sup>d</sup> Where corporations or other classes of men, are bound to admit another to certain privileges to which he is entitled. It is not necessary it should be a corporation. As you may compel a county court to admit a person to the bar if he is



qualified. 4<sup>th</sup> Where persons are de-  
prived of privileges wrongfully, as if a horse  
is thrown over the bar without cause.

This is not to compel a specific performance  
of contract for then you must go to chancery.

Wherever a specific remedy can be had in law,  
or equity, mandamus will not be issued. It  
is not to be understood that no actions will  
lie, for they will generally.

1<sup>st</sup> I shall consider the mode of proceeding  
at common law. The man injured makes  
complaint to the superior court, and makes  
affidavit stating all the facts, as that he  
bought such land, that he carried the deeds  
to the clerk and he refused to record them.  
The court then issues out a warrant to the  
officer, stating containing the complaint, and  
directed to be served on the clerk. The war-  
rant states that an application has been made  
to them so and so and directs him to record

the deed within a limited time or render  
his excuse. If he then records the deed, the  
matter stops. But suppose he does not,  
then he must state to the court his excuse,  
and if it is said by the court to be sufficient  
one, then there is an end, but if insufficient,  
they then issue a peremptory mandamus.

If the man makes a sufficient excuse whether  
true or false the court at common law  
cannot enquire into it, but must dismiss  
the business immediately. The party injured  
may then have his action for false return,  
recover damages, and have a peremptory  
mandamus.

Concerning the alteration made by Stat.  
of Chanc. This is like the other as to you  
get to the return made on the first man-  
damus. Now if the applicant knows it  
to be false the law reverses it if it is found not  
true the court issues a peremptory mandamus.

If the exact mandamus is not obeyed



within the time limited, the court issues  
a writ of attachment for contempt and he  
is committed.

There are cases where money is concerned  
and a mandamus issues. As where counties  
are under obligations to build jails, bridges &  
new towns may be sued but counties can-  
not, because they are not considered as cor-  
porations. The method of issuing a manda-  
mus against a county is, after an appli-  
cation to the Treasurer and not receiving  
the money to apply to the court for a  
mandamus. The Treasurer's excuse is that  
he has no money of the county. A writ  
of mandamus then issues for the Justices to  
lay a tax, which if not done, an attach-  
ment issues to commit those who are  
not willing to comply with the mandamus.

# Habeas Corpus.

Lecture & May, 15<sup>th</sup> 1816. Reeve.

In considering this subject I shall confine myself to the meaning of habeas corpus at common law. That has been much amended by the Statute of Charles 2. but as that Stat. has been made since the emigration of our forefathers, it has never been adopted in this country.

The object of this writ is, to bring up the body of a prisoner, and also the cause of his detention before the court. It may be granted where the imprisonment is complained of as unlawful, or where the original imprisonment was lawful, yet by something subsequent, further detention is unlawful, or where the imprisonment is in an improper place.

It is no matter in what manner the



imprisonment is made - The writ lies where there is a prevention of loco-motion as an husband confining his wife, or detaining in private house or other place &c.

The object is to see that no person shall lose his liberty except by the laws of the land. As if a man is brought before Justice for a crime, and committed, for trial, the Justice supposing the offence not bailable, he may demand his habeas corpus and be admitted to bail. This writ is granted by the Superior courts in England viz. By the court of Kings-bench in term time, and by the court of Chancery both in term time, and in vacations. This is the common law, but by the Stat. of Charter 2. The Common Pleas, and Exchequer together, with the others may issue it in term time and in vacation. As we

4 Inst. 81.

82-290

2 Inst. 59

Drumman 154

3 Inst. 172

have not adopted the Stat. of C. 2. our court answering to Kings-bench can alone issue it in term time, and Chancery both in

vacation and term time.

206

May a man have in all cases a writ of habeas corpus? He will be refused the writ if he is in jail on a conviction of a crime, or in execution for a debt. There may be statements made on these however, that will entitle to habeas corpus. As if a man is imprisoned 2 Inst. 52 on a conviction by a court not having jurisdiction of the crime. One thing about the Stat. of Charles. Some have supposed from inattention in perusing this Stat. that it excluded those from habeas corpus who are confined on a charge of treason or felony, but all that is meant by these exceptions is, that a Justice may not grant the writ in vacation for these offences, tho he may for others, but it shall in such cases be only issued in term time. If a person is privileged from particular arrests an habeas corpus will try the question.

The business of a court on an habeas corpus is either to remand the prisoner, to take



Boates His  
comment. 143

hail, or to discharge him.

23 Mar. 765

This is grantable of right to every body, except prisoners of war.

15 Apr. 1

2 Mod. 306

1 Talk 350

2 Inst. 55

Tom Jones. 173

2 Lev. 124

1 Burr. 631

2 Inst. 55

Bayan. 156

et n habeas corpus when it is awarded for a person confined for a crime, must be by motion to the court, like an application for a mandamus. In other cases there is not this formality; it is by application to the clerk, who signs it.

In the return the officer must show by whom, the person was committed, and also the cause. Suppose the officer makes no return? An attachment issues against the person who ought to make it. It has been said that another order must issue previous to a t-

achment - The Stat. of Charles has done away this, it issues immediately. The return must have sufficient certainty. But if the court can understand by whomse committed, and for what, it is now deemed sufficient. Suppose the officer falsifies the return? The court must take it for truth, and no habeas

corpus issues. The officer is liable to heavy penalties. 207

Where a return is made by any other person beside an officer, the court give no credit to his return, but have the party before them and enquire into the facts. As if a woman petitions by a friend for a habeas corpus to deliver her from a confinement by her husband. It cannot be returned that she is insane, but she must be brought before the court, that the court may enquire into the facts.

If the return shows sufficient cause and it comes from an officer, the court must remain the prisoner, unless it is a bailable offence.

2 Inst. 55  
Carym 157  
1 Cro. 78  
5 mod 28

This authority extends over every confinement, that can be mentioned. Hear 794

The conviction itself must be brought before the court. Any person may petition for habeas corpus, for another who cannot do it himself. Mar 794

Suppose one person claims the person of another who is in the possession of a third. The claimant may have this writ to bring



the person before the court. This is not on the ground of false imprisonment but the right which one person has to another. As an infant, a wife, a child &c. The court generally consider the circumstances of each case, and frequently leave it with the person to determine with whom he will reside.

2 Do. Kay. =  
1354

2 R. 982

1 Burr. 606

This writ as used in the manner we have been speaking of, is called a writ of Habeas corpus ad Subjiciendum.

10 B. 230

5 Burr. 1446

There is also a Habeas Corpus ad testificandum and various other kinds.

# Prohibitions.

Lecture May 16<sup>th</sup> 1810.

This is a writ but little used in this country, as the powers of the courts are so well defined.

It is a writ issuing from a superior court, to an inferior court, and to the party prosecuting, prohibiting them from proceeding to try a cause which is not within the jurisdiction of the court.

2 Roll. 317  
Hard. 1175  
2 Ld Ray 403

It issues from any of the superior courts, as Exchequer, Kings bench, & common pleas and also from the court of Chancery.

12 Co. 59  
Palmer -  
- 526

When a prohibition is prayed for, it is made with to the court with a suggestion of the facts and an affidavit of those facts. What if it appears to the court not to be sufficient, or that the court has jurisdiction? The court dismiss it, and do no more about it. But if the facts as stated appear sufficient - a rule goes out giving notice to the party to appear before the court at a certain

Barns 42



time and show cause why a prohibition should not issue. This operates as a temporary prohibition, and is properly an order that the party should show cause why this prohibition should not continue. If this order is not obeyed, it is a contempt of court, and a *habeas corpus* goes out. But if the party comes into court, the applicant files a declaration which, if the facts are denied is traversed, but is demurred to, if the court claims jurisdiction. It follows then that there must be a judgment - if for the applicant, it is *prohibitio statim* and all damages sustained are recovered by this writ, but if for the Defendant then they proceed.

### Audita Querela.

This is a writ to which a man is entitled in this case and this only viz. When a man is oppressed with an execution which ought not to be paid, and has no day in court to defend

269  
against it. Then it may happen when the ex-  
ecution is in fact paid, but not indorsed  
on the execution. Again suppose two men are  
sued in two courts for the same trespass, one  
suit is not a bar to the other, but judgment  
goes against both. Execution is satisfied by  
one, but a man can have but one satisfac-  
tion for the same injury, but the other has  
no way in court to show this. May have his  
studia querela. It is not a writ that issues  
of course, but only upon good cause shown to  
the court. The operation of the writ is that  
it is of itself a supersedeas to all proceedings.  
It is further an absolute destruction of all the  
proceedings. But to prevent injury from  
issuing, must give bonds to respond the  
damages that shall accrue. These bonds  
come in lieu of the executions. It not only  
is to set aside the execution &c but to give  
damages, as much as in an action on the case.  
It is a liberal remedy.

609.29  
606.443  
2<sup>d</sup> June 378



19th 366  
18th 43

If you have had a day in court to plead  
the matter, you can never have an *audita lac-*  
*reta*. This perhaps is laid down a little too broad.  
1. where a man sued another on a note of hand,  
the Def<sup>t</sup> wrote a letter and told the Plff. he could  
not go down to court; but if he would meet  
him half way, he would pay him. They met  
and Def<sup>t</sup> paid and ~~gave~~ <sup>Plff. gave</sup> a discharge to ~~the~~ <sup>him</sup>,  
as he had not the notes. Plff then obtained  
judgment by default, and issued out exi-  
-cution. The Def<sup>t</sup> in this case obtained a writ  
of *audita querela*, although he might have  
had a day in court to have pleaded his dis-  
-charge. He supposed the notes were destroyed,  
and there was no negligence.

Who grants this writ? In England it always  
is granted by the judge of the court whence  
the judgment issued. In Court it has been an  
immemorial custom which cannot be traced for  
The Chief Just of Court of Com. pleas in the country  
alone issues it, unless he is sick, and in such  
case the next Judge in Seniority.

# Powers of Chancery

There has been much difficulty in ascertaining by proper description the general powers of chancery. There have been many attempts but all have failed hitherto, because all the objects of this Court's jurisdiction cannot be included in any definition which has yet been given. The proper jurisdiction of a court of chancery has been defined to consist in three particulars. 1<sup>st</sup> It is said it abates the rigor of the common law. 2<sup>nd</sup> That it decides according to the spirit and not according to the strict letter of the rule. 3<sup>rd</sup> That it has a peculiar jurisdiction over Fraud, accident, and trust:— This is Littleton and Coke's definition, and the same is given by La. Kains. Again it is said that a court of chancery differs from a court of Law inasmuch that the

Milne 5  
3 Bl. 429



1 Asth. 374

10 mod. 1

Justice is not bound by precedents or positive rules.

This description is now agreed to be very imperfect; it is imperfect in all the parts of a good definition; for first it is incorrect because it supposes a court of chancery to possess powers which it does not possess: and secondly, because it does not give the court all the powers, which it does possess. 1<sup>st</sup> It is said, it is the power of a court of chancery to abate the rigor of the common law: but this power has never been claimed except in the same way in which a court of law would do it; true. Chancery gives relief where law cannot, but it is on the ground of jurisdiction. There are many rules of the common law which are extremely rigorous; thus before the Stat. 3 and 4. Wm & M<sup>ty</sup>, if a debtor conveyed away his real estate, his bond creditors could never have a remedy. In this case neither law nor Chan. could give relief and even now a man's real estate devised or inherited

is never liable for simple contract debts, & 211  
Chanc<sup>y</sup> cannot interpose. 2 Bl. 678.

The rule of descent that a lineal ancestor  
shall never succeed to an estate is a positive  
and rigid rule of law, yet Chanc<sup>y</sup> cannot pre-  
vent this rule from operating. So, that the  
half blood should be excluded from inherit- 2 Bl. 2434  
ing is a hard rule. Equity cannot change - 377  
agreements the hard. These show that  
there are many rigorous rules of law, that  
Chanc<sup>y</sup> cannot do away, and yet the defini- 3 Bl. 430  
tion is that it is the duty of a court of Chan- 2 Atk. 234  
to away these very rules. In general the rules  
of common law are not hard, and rigorous;  
for various reasons, however some are so. It is  
true then generally speaking that a court  
of Chan<sup>y</sup> has nothing to do with the common-  
law rigor, in abating it. 2<sup>nd</sup> It is said that  
a court of Chan<sup>y</sup> decide according to the spirit  
and not to the letter of a rule; but a court  
of law is bound to decide according to the  
spirit of a law; and it is a standing end.



cardinal rule in the construction of all law,  
that the spirit of it shall be the guide &  
all other rules are merely ancillary to this.

3 Bl. 431

1 Bl. 61

Dong. 264

The rules of construction is common to both  
courts, and so is the rule as to the construc-  
tion of contracts. 3<sup>d</sup>. A court of Chan<sup>y</sup> it is  
said has a peculiar cognizance of frauds, ac-  
cidents, and trusts. But as to frauds, there  
is perhaps no species of it, which may not in  
some manner or another be decided in a  
court of law. A court of chancery have not a  
exclusive jurisdiction of frauds, because mat-  
ters of fraud are generally decided there. The  
reason why Chan<sup>y</sup> interferes generally in frau-  
dulent transactions is, because the method of  
proceeding is better adapted to a discovery,  
and the relief given is more complete. Indeed  
in some cases the courts of law have an ex-  
clusive jurisdiction of matters of fraud, as the  
question whether a devise was obtained from  
a person by fraud. 2<sup>nd</sup> Accident; it is true that  
courts of chancery will often relieve from the

Pow. D. 64 n

691

1 R. Wms. 287

3 Atk. 177

544

unfortunate consequences of an accident, than  
 Courts of law; but yet the latter will do it, as in  
 the case of a deed lost, which a person may a-  
 -vail himself of in a court of law, as well as in  
 a court of Chan<sup>y</sup>. Thus in a bond which a man  
 has lost he may declare on and say, it was  
 lost by time or accident, and a court of law may  
 give the amount of it; if it was not lost by his  
 own negligence, which is as much a court  
 of Chan<sup>y</sup> could do. Perhaps a court of Chan<sup>y</sup>  
 does relieve in more cases of accident than a  
 court of law; but it is not true that it has ex-  
 -clusive jurisdiction. Mistakes. Courts of Chan<sup>y</sup>  
 relieve in more mistakes more than courts of  
 law; not because it has an exclusive juris-  
 -diction, but for the reasons before given in  
 its mode of proceeding, and in the competen-  
 cy of its relief. But mistakes are relieved in  
 law, as mistakes in Account—contingencies  
 which render performance of a condition  
 impossible: but all mistakes cannot be  
 relieved, either in law or equity, as if a

5 Co. 74

3 Term. 151



devise is ill executed by mistake. Chan. 4  
can give no relief against it. So when a  
contingent remainder is destroyed at law by  
some matter of accident, Courts of Chan. 4 can  
give no relief against it. Trusts. These are  
generally cognizable in Equity and some of  
them there only. But a court of law has cog-  
nizance of trusts in many cases. As, in com-  
mon cases of bailment, where the Bailee is  
strictly a Trustee. There is no case where a  
court of Chan. 4 has exclusive jurisdiction of  
a Bailment because it is a trust. Where  
there is money had and received, the recei-  
ver is in strictness of law a trustee, yet there  
is no necessity of applying to Chan. 4 for  
relief. A proper technical trust is regulated  
only in Chan. 4 for this reason. That the title in  
law is not consummated. It is only binding  
in conscience. Chan. 4 will in some cases aid a  
title defective at law. Mistakes in written in-  
struments are generally aided only in Chan. 4.

3 Bl. 491. 2

1 Root. 105

2-20. 209

The reason is not because there is any intrinsic  
 quality in a mistake that renders it pecu-  
 liarly ~~misapprehension~~ cognizable in a court of  
 Chan<sup>y</sup>, <sup>but</sup> because in this case a court of law  
 could not give complete relief by reason of  
 its mode of proceeding. Suppose a bond exe-  
 -cuted for \$2000 when the parties mean only  
 \$100 and afterwards the obligee is dishonored  
 enough to insist on the \$2000. now in law a  
 contract cannot be apportioned. The bond is  
 either the act of the party or not. If it is, the  
 jury must give the amount of the bond when  
 there has been no payment. If non est factum  
 might be pleaded to it, the obligee would suffer,  
 for he has a right to \$100. A jury then cannot  
 apportion the bond, and the court never appor-  
 -tion damages; but the Chancellor can make  
 a decree, that the obligor shall pay \$100, and  
 upon doing this the obligee shall deliver up  
 the bond. Lastly it is said that courts of  
 Chan<sup>y</sup> are not bound by precedents or pos-  
 -itive rules. A more incorrect proposition

1 Bos 6499  
 2 Atk 31  
 — 203  
 3 Atk 389  
 1 Vesey 318  
 1 Br & BH 341  
 2 Vesey 374  
 2 Root 415  
 — 499  
 Kirby 399  
 1 Root 105  
 — 44  
 Dyer 600  
 2 Burr  
 Washburn  
 Sanford



could not be laid down. The courts are bound  
by precedents, and many times by those which  
they want to get rid of. Thus a distinction  
is made between the right to dower and cur-  
tesy. If the husband is possessed of a trust  
estate, it is settled in Chancery that the wife  
shall not be endowed of it, but if she dies  
possessed of a trust-estate, he shall be tenant  
of it by Curtesy. If there is such a distinction  
made it ought to take in favour of the woman.  
For he may get seized for the wife but she can-  
not for him. Again a settled distinction is  
made in a mortgage between one with 5  
per cent, with a clause of reduction to four,  
if the interest be regularly paid and one at  
4 per cent. with a clause of enlargement to  
5 if the payment of the interest be deferred;  
one being an unrighteous, the other a consci-  
entious bargain; these are positive rules  
founded on precedents. Now there is not a par-  
ticle of difference between the above; the sub-  
stance in both is precisely the same.

Pow. Mort. 112  
321

1 Atk. 604

2 P. Wm. 940

Thus far with regard to the general descrip- 204  
tion given of the powers of Chan<sup>y</sup>. Judge Black-  
stone has given another which is not complete  
is the best which has been given. He says, the  
principal difference consists in the mode of ad-  
ministering justice, or giving effect to the same  
principles, and this difference consists in three  
particulars - mode of proof - of Trial, and of  
Relief. 1<sup>st</sup> As to the proof. In this particular  
Chan<sup>y</sup> has a great advantage over courts  
of law, it can compel a disclosure under  
oath - this is a power the common law courts  
do not possess - Why? The reason is not given  
in the books but there is a substantial one,  
viz. that if a party were compellable in law  
to make a disclosure, he might be greatly in-  
jured, by a positive rule of law. In Chancery  
this can never be done. Courts of Chan<sup>y</sup> have  
no criminal jurisdic<sup>ti</sup>on at all and sometimes  
in courts of law the disclosure would work a  
penalty, and it has therefore become a stand-  
-ing rule in Equity, that if the disclosure



will work a penalty, the Chancellor will en-  
 -join the party and all others not to sue  
 for nor take advantage of the penalty, and  
 will compel them to enter on record this  
 promise. This compulsive disclosure is cal-  
 -led purging an oath - appealing to party's  
 conscience, and the party may be compelled  
 to make a discovery - of all facts within his  
 knowledge. From this power of compulsive  
 discovery, the court of Chan.<sup>y</sup> has obtained  
 concurrent jurisdiction in matters of <sup>fact</sup> legacy,  
 of administration and distribution of legacies,  
 partnerships, affairs generally, in many cases  
 of fraud, when Bailiffs, or receivers are sued;  
 there are all incidents to the power of com-  
 -pulsive discovery, - and their judgment is the  
 same in Equity as at law. 2<sup>nd</sup> c. to the mode  
 of trial. Chancery trials in Eng<sup>d</sup> are by inter-  
 -rogatories stated in court by counsel, and  
 approved of by the Court; from which dep-  
 -ositions are taken out of Court and afterwards  
 read in Court. This is not the mode in Coun!

3 Bl. 381.2  
 437.  
 .49

2 P. 111. 125  
 3. 80. 148  
 2 Vern. 277  
 3 Bla. 437.

Here it is generally done viva voce.

715

This mode of trial is useful in many cases indeed in some cases, the question cannot come up before the court without the interference of Chancery. As if a witness is about to leave the realm, is aged, or infirm. Courts of Chan<sup>y</sup> may take the depositions provisionally, which are called "de bene esse" - taken by a commission <sup>granted</sup> to perpetuate testimony. These depositions thus taken may be used in a court of Law, and Chancery will enjoin the opposite party not to object to them. In consequence of this power - Chan<sup>y</sup> may exercise a jurisdiction over the subject itself, which a court of Law might do if the witness might be called before them; this is incidental to a collateral jurisdiction of theirs. 3<sup>d</sup> As to Relief. Chan<sup>y</sup> in many cases affords specific relief. So if executory agreements for the sale or purchase of land are made - Chan<sup>y</sup> will decree a specific performance. A court of law could it



381 435 only give damages for the breach of the ag-  
1 P. 11 215 - reement - which might be very inadequate.  
1 eq. cas 16 - Indeed in many cases Chan<sup>y</sup> assumes jurisdiction  
1 16 413 for this very purpose of affording a more spe-  
1 16 382 cific remedy than can be had at law. It in-  
terposes and assumes a concurrent jurisdic-  
tion. So for Waste the law gives damages, and  
under the Stat. of Glouc<sup>r</sup> the thing wasted.  
But Chan<sup>y</sup> will issue a prohibition to pre-  
vent waste. By "Specific relief" is meant  
that which reinstates the party in his rights,  
as they were before they were actually vio-  
lated. This injunction in the case above  
mentioned merely continues him in the en-  
joyment of his rights as they were before vi-  
olation, so it is properly called specific. So  
where Chan<sup>y</sup> interposes to prevent the effects  
of fraud in a contract it affords a specific  
relief and vacates the contract either whol-  
ly or partially as justice may require; where-  
as courts of law will compel a performance  
and afterwards give the party injured dam-

ages in an action on the case. So it requires 216  
two suits; but Chan<sup>y</sup> prevents the evil, and  
preventive is better than punishing justice. 331 439  
1800. 319

In many cases Chan<sup>y</sup> will decree for that very  
purpose. In some cases in law to be sure, the  
remedy is specific, as in Ejectment and sometimes  
in Detinue. I have gone thro' summarily the  
three particulars in which a court of Chan<sup>y</sup>  
differs from a court of law Mode of proof, trial,  
and relief. But they differ in other respects,  
and as to them it is more difficult to ascertain  
the boundaries of Chan<sup>y</sup>, or describe its powers  
than in the other three particulars. The different  
view taken in a court of law and of Chancery  
of a penal bond, gives a great jurisdiction  
to the latter court. In a court of law the whole  
penalty is, and must be recovered, by the breach  
of such bond. But in a court of Chan<sup>y</sup> the  
penalty will not always be given to the Chan-  
cellor may look into the question, and if he sees  
that the damages are not equal to the pen-  
alty, he will chance the bond and decree



what is really due. In law the penalty is  
considered as a debt. In Chan<sup>y</sup> it is consid-  
ered merely as a security for the debt a nomi-  
ne poenae. Hence it will be said, a different  
construction will then be put on the whole in-  
strument, than what could have been done in  
law. True; so courts of law put different con-  
structions upon whole instruments and in  
some a penalty is not considered in law as a  
debt. As where a penal bond is given for the  
security of a debt, and not for the perform-  
ance of a condition. The court if this has run a  
long time will give not only the bond but the  
interest. Here they consider it as evidence of  
a debt. It cannot then be said with any  
more justice that courts of Chan<sup>y</sup> and of law  
differ in the construction of these bonds, than  
that a court of law differs from itself in the  
construction of different instruments where the  
penalty is the same, and the condition the  
same. By this ground Courts of Chancery

have obtained a very great and almost a total  
 jurisdiction of the Mortgages. The condition here  
 is in the nature of a penalty and is taken notice  
 of by a court of Chan<sup>y</sup> in the same manner as  
 the penalty in a penal bond is in Court of law.

The interest of the Mortgagor is gone ~~forever~~  
 unless he pays at the time specified. At Chan<sup>y</sup>  
 it is different. This court has created an equity  
 of redemption unknown for most purposes at  
 Law. Here it may be said there is a difference  
 of construction in the two courts, altho it is a  
 general rule that the construction of an in-  
 strument should be the same in law and equi-  
 ty: yet the rule of construction may be different  
 between these courts as well as between two courts  
 of law. But as I before observed this equity of  
 redemption is for some purposes considered in  
 law: and so far, that where it exists they will  
 consider it such a freehold interest as <sup>comports</sup> with  
 a settlement, and which gives the person enti-  
 tled to it, the power of voting for members  
 of Parliament. The objection is no more



higher here than it is, where there is a dif-  
ferent rule of construction in the same court  
on the same instrument, for different pur-  
poses. This forms a fourth ground of distinction.  
5<sup>th</sup> A technical trust or use in lands or in  
real estate, as contra distinguished from a le-  
gal estate affords an extensive jurisdiction  
to the English courts of Chan<sup>y</sup>. not so much  
in Connec<sup>t</sup>. because trust estates are little  
known here. A trust estate is where the  
legal title is in one and the beneficial  
in another. In ordinary business courts  
of law will not take notice of cestuy que trust.  
They take notice only of legal estates, Chan<sup>y</sup>  
of equitable estates. In a court of law the  
legal title must govern; yet where an estate  
is given to one to hold for another's use and  
benefit, there ought to be a remedy provided  
to him who has the beneficial estate. A court  
of Chan<sup>y</sup> has power to give this remedy.  
Mitford in his Pleadings in Chan<sup>y</sup> has endeavor-  
ed to give a general description of these

38 la. 439  
2. 27. m 645  
" 668

5  
powers of Chan<sup>y</sup>, which are not comprised 218  
in the three divisions of Blackstone. The  
description which he gives is this. He first  
says with Blackstone, that a court of Chancery  
acquires a jurisdiction by its different methods  
of administering justice, and then says  
1<sup>st</sup> That a court of Chan<sup>y</sup> has a power to enforce  
justice where positive law is silent, and where  
without the interposition of Chan<sup>y</sup> justice  
could not be done. 2<sup>nd</sup> A court of Chan<sup>y</sup> may  
abate the rigour and supply the defects of the  
Comm. law, where such rigor and defect is a  
collateral and unforeseen consequence of the  
rule of Comm. law. as he explains this it is cor-  
-rect. But to do these things by avoiding col-  
-lateral mischief, the consequence is nothing  
more than giving effect to the true spirit of the  
Comm. law. And courts of law have a right to  
judge according to the spirit of law. Yet he  
says, if the unjust consequences of a rule of law  
are directly obvious, and if the unjust rule  
seems designed for the cases to which it literally



extends, and must have been foreseen at the  
time of making the rule - Chan<sup>y</sup> cannot in-  
terpose and prevent the consequences of the  
rule. Examples of both kinds. First injunctions  
to stay waste; the comm. law affords no pre-  
ventive remedy. Suppose a tenant for life  
then commits waste; now a court of law can  
only give damages after the fact is committed.  
But if there is a plain intention on the part  
of the Tenant to commit waste, a court of  
Chan<sup>y</sup> which is always open will issue an  
injunction to prevent him from committing  
waste. Again it is a general rule of law that  
all contracts made between husband & wife,  
before marriage are avoided by the intemar-  
riage; but it seems hard that those con-  
tracts which are made for the furtherance  
of the marriage should be avoided by the  
marriage. Now there is hardly a marriage  
in England without a marriage settlement,  
and a court of Chan<sup>y</sup> will enforce these mar-

=riage settlements & agreements - The Comm. Law  
rule to the contrary notwithstanding. A  
court of Law does not then decide according  
to the spirit of the rule; and all the decisions  
of Law are, that such agreements cannot  
be enforced in a court of Law. These distinc-  
-tions embrace all the well defined grounds  
of the jurisdiction of a court of Chancery,  
perhaps not all. One ground of the jurisdic-  
-tion of a court of Chan<sup>y</sup> (which comes under  
the three particular mentioned by Blackstone,  
or relief) consists in decreeing a specific per-  
-formance of executory agreements. This power  
has been exercised from very ancient times, from  
the reign of Edw.<sup>d</sup> IV. In the reign of James I.  
there was a violent contention between the  
courts of Law, and the courts of Chan<sup>y</sup> on this  
subject. The former held that Chan<sup>y</sup> had no  
power to decree a specific performance, and  
that the party had a relief only in Law, by  
a recovery of damages; but the Chancellor  
stood his ground, and obtained a complete

Oct. 651  
17 Jan. 27.8



15th. 6. 5. 6

16th. 572

victoria. However at this time they were not  
frequent, tho they became quite so in the  
time of Charles II. in the 2d year of his reign.

17th. 18. 93

131. 442

bro 6. 537

It is thus by decreeing a specific performance  
that marriage settlement agreements made  
before marriage, in Chan<sup>y</sup> are carried into  
effect. General rule at Law contra.

By a specific performance of executory agree-  
ments is meant that the things agreed to  
be done, should be specifically done i.e. that  
the very things agreed to be done should  
be done. There has been a question made  
whether such marriage settlement engage-  
ments should be enforced, when they were in  
the form of a penal bond. But it is now settled  
that if either party execute a bond before  
marriage to settle an estate upon his wife  
either after or during coverture, this bond  
shall be specifically performed as an agree-  
ment by the decree of a court of Chancery.  
It is not in the form of an executory agreement,

The Chan<sup>y</sup> considers it as simply one. The object  
was to procure a settlement for the wife, and  
to construe it in any other way than as an  
executory agreement would defeat the object;  
and Equity adverts to the substantial object.

12 Int. 43. 4  
22 Vm. 243  
2 Atk 97  
100 Con. 316

Such a bond is good or not at Law, according  
to this difference the former, the idea was that  
it was to be avoided at all events viz. If it  
was made with a condition that such and  
such things shall be done after coverture is  
ended it is good at Comm. law, but if the  
things are to be done during coverture it is  
void at law, because the wife cannot sue  
her husband at law. In the former case the  
heir of the husband will be compelled to do  
the thing his ancestor contracted.

21. 4. 216  
Salk. 375. 2  
5 Term. 381  
2 Kay. 515  
Pow. B. 442.  
443

Again it is a clear rule at Comm. law that an  
agreement made between husband and wife  
during coverture is void; and it was former-  
ly holden that in Chan<sup>y</sup> such an agreement  
could be enforced only through the medium  
of trustees. Now such an agreement made



during coverture may be specifically enforced in Chancery without the intervention of trustees.

1 Inst. 31.

Litt. 168

1 Port. 94.5

Re. Ch. 22.

3 Atk. 70.72

1 Br. 270

2 Vesey. 308

The husband is considered as trustee to the wife. She has the legal title for her, and she has the beneficial interest.

The ground of Chancery's interference in this case is its peculiar cognizance of technical trusts. The mode of enforcing the contract is founded in its power of enforcing specific contracts. And it is to be observed that where the Court of Chancery has enforced such an agreement made between husband and wife, the latter in most cases may dispose of this property as though she were a feme sole. True, she cannot make a contract concerning it which will bind her at law.

She may bind herself as a feme sole according to the laws of Equity, not according to the common law.

Per. Can. 444

2 Vesey. 191

1 655

1 Bla. 442

1 Inst. 112.

It has been decided in Connec. that such a contract made between husband and wife cannot be enforced in Equity. I have observed that an agreement between husband and

12 Vesey. 221

wife was sometimes enforced in Chan<sup>y</sup> notwithstanding 226  
the comm. law rule that contracts  
between husband and wife are void, & that  
the foundation of this was their right to  
enforce a trust. - It is to be observed however  
that Chan<sup>y</sup> will not in general enforce  
such contracts where the effect of enforcing  
them is prejudicial to Creditors. And if  
there is no consideration, and any appear-  
ance of fraud it will not be good against  
Creditors, or bona fide purchasers even in  
Chan<sup>y</sup>: but want of consideration is no  
more conclusive evidence of fraud in this  
case, than<sup>in</sup> any other. It is not sufficient  
evidence of fraud per se: it will not there-  
fore be set aside merely because it is void. 1 Kent 75  
- 3 B. & M. 399  
- 399  
- Corp. 708  
- 10th. 152  
largely there must be some appearance of  
fraud. It is not necessary for me to recite  
all the badges of fraud. However if the  
husband is largely in debt at the time of  
the contract made to settle &c it is one badge  
of Fraud; so if there is a power of revocation



1 Font. 262

267

2 Barb. 218

3 Co. 82 or

— 829

1 Vern. 132

— 76

1 Font. 264

that is, another; or if the contract is to settle the whole, or a great part of the husband's property on the wife, it is evidence of fraud; yet if he is not greatly in debt, and makes a contract to settle a jointure or family settlement without any badge of fraud, tho' he afterwards becomes greatly indebted - Chan.<sup>ty</sup> will not set it aside in favour of creditors. The same rule applies to subsequent-purchasers, as to creditors. But under any or all these circumstances, tho' the contract is voluntary it is binding upon the husband, or his representatives. Else now they can make no objection that it was voluntary, or that it was done to defraud creditors, tho' a voluntary conveyance is presumptive evidence of fraud tho' it may be rebutted. It appears from several examples that the court of Chan.<sup>ty</sup> adverts to the substantial object of all contracts, and gives effect to them, so as to obtain that

7

221

object and this it does without regard to the particular form of the contract. This is the case with a bond given to compel a conveyance of lands, then a court of Chan<sup>y</sup> will always compel the obligor to convey the land, altho there is no stipulation or express covenant to do it, unless the penalty is in the nature of a fixed damages, and when enforced it is considered as an executory agreement. If one of two or more obligors pays the whole debt and then as the easiest way takes an assignment of the bond and brings his action against the obligor in the name of the obligee - Chan<sup>y</sup> will order the obligor not to plead that the obligee is paid and therefore that the debt is discharged.

But if the case was such that he who paid the whole was only surety, Chan<sup>y</sup> will order the other obligor to pay the whole and issue an injunction to prevent the obligor from pleading payment in an action in a court of law on the bond. In this case the court



2 Vesey. 371. 4

3 Term. 423

3 Bac. 701

Haid. 164

8 Term. 166

interposes to enforce the agreement between the obligor implied by law, from the facts as they exist. It will therefore be retained on the part of the man who has paid the whole, on the ground of an implied contract.

In Council. There would be no necessity for applying to Chan<sup>y</sup> in this case, for an action of indebitatus assumpsit will lie for money paid laid out, and expended; and from some dicta

1 Bro 6. 316

in the books, it seems the action would lie in England. And if the person has paid the whole as surety, this action this action will lie in his favour for money paid for his (the Deft's) use. But where there is a single bond as in the case first mentioned there can be no action of Indeb<sup>to</sup>. With regard to the equitable cases in which a court of Chan<sup>y</sup> will interfere, the general rule is that equitable interposition extends to all cases where the subject of the contract or the parties to it are within the jurisdiction of the court, for the court

acts as well in personam as in rem. As the 222  
rule stands in the books, it is incorrect,  
for it cannot mean that whenever the par-  
ties or the subject are within the local limits  
of its jurisdiction, it will afford relief, if so it  
would have cognizance of all cases which a  
court of law would: but it certainly has  
no such cognizance. The rule means this,  
that when the matter in dispute is of such  
a nature as to require the interposition  
of a court of Chan<sup>y</sup>, that court will take  
cognizance of it, if the parties be bound  
or the subject matter of the contract is  
such as is within the limits of the juris-  
diction of that court. - The rule in the books  
then, should have been expressed in the  
negative - That Chan<sup>y</sup> does not interfere  
where the subject or parties are not within  
the jurisdiction of the court. Thus in Eng<sup>d</sup>  
suppose A covenants to convey lands to  
B. and leaves the Kingdom. This is such  
a contract as requires the interposition



of a court of Chan<sup>y</sup>; for that decrees a spe-  
cific performance of contracts; this then  
is within the rule, for the party be in  
the U. States yet the land the subject is  
within the jurisdiction; it acts here in rem.  
So if it in Eng<sup>d</sup> agrees to convey land in the  
U. States to B. Chan<sup>y</sup> will enforce this be-  
cause it acts in personam as well as in rem,  
by process of contempt and sequestration of  
goods and land. This court enforced a spe-  
cific performance in the case of D. Baltimore  
and Gov<sup>t</sup> Penn, on the boundaries of Penn-  
sylvania and Maryland. There are several  
cases on this subject. But when neither  
person or subject are within the jurisdic-  
tion of the court of Chan<sup>y</sup> it cannot inter-  
fere whatever the nature of the case may be.  
Formerly it was holden that this court could  
not act in rem i.e. it could not specifically  
enforce its own decrees, and that it could only  
act in personam. This has long since been  
overruled, and it is now settled that

2 Vern. 494

1 Vesey. 204

1 Vesey 444

- 454

That Chan<sup>y</sup> can act in rem by issuing pro- 223  
 cess, to put a party in possession of lands  
 within its local limits, by injunction or writ  
 of assistance to the Sheriff, as well as in per-  
 sonam. While the old opinion lasted that  
 Chan<sup>y</sup> could not act on the subject-matter  
 of the contract, it would have been argu-  
 mentary for that court to have made a decree  
 respecting the sale of lands. The practice of  
 acting in rem first began in the reign of Jam. I  
 I have considered the general grounds on which  
 a court of Chan<sup>y</sup> interposes, but I have not  
 considered the particular cases under those  
 general grounds in which they will inter-  
 pose. Generally however they will decree a  
 specific performance of agreements, properly  
 falling within its jurisdiction, in those cases  
 and generally those only when the courts of  
 law will give damages for the nonperform-  
 ance of the agreement. On the contrary  
 they will not generally decree a specific  
 performance, where the courts of law will

1 Kent. 91

2 Pro. 8. 9

3c Atk. 275

- 387

1c Atk. 541

16 Cray. 454

84

1 Kent. 31



2 Cow. 14. 16

1 Brnt. 189

2 Term. 207

Amb. 406

1 Hen. B. 227

not give damages, as the it may fall within its jurisdiction. And they will not decree a specific performance of course, because a court of law will give damages for its non-performance; it must fall properly within its jurisdiction. Whence arises the reason for this distinction, or is there none for it?

I think there is an obvious one which may be furnished by a recurrence to what has been said. This decree for a specific performance is generally only in aid to that remedy granted by law, or in other words this power is exercised <sup>principally</sup> generally for the purpose of giving a man a complete and more adequate remedy, when the laws before gave an incomplete and inadequate remedy. The principles in the two courts are generally the same; tho they have different modes of proceedings. In pursuance of this they will not enforce a voluntary agreement except between husband and wife, because for a breach of a voluntary agreement a

court of law would give no damages, or  
even of a covenant under seal when vol-  
untary. For Chan<sup>y</sup> will not raise a  
right, which the contract does not raise,  
and such a voluntary agreement is in law  
a nudum pactum. But there are except-  
ions on both sides of this rule. 1. A spe-  
cific performance will not always be im-  
posed in Chan<sup>y</sup> at the courts of law would  
give damages for the non-performance of  
the agreement. Thus suppose that after an  
executory agreement is entered into for the  
conveyance of lands, and a third person  
not knowing this agreement should be-  
come a bona fide purchaser, and get the  
legal title - here Chan<sup>y</sup> will not decree a  
specific performance, because it would be  
unjust to the purchaser; he has paid a  
valuable consideration, and he was ignorant  
of the executory agreement (it is no lien  
against the bona fide purchaser without

224  
10th. 341  
242  
16th. 10  
16th. 450  
74  
17th. 30.6



notice / and against the other party it is  
mandatory. It has become impossible that  
it should be specifically performed in the  
view of a court of Chan<sup>4</sup>; yet in this case  
a court of law will give damages and the  
reason of damages is a want of relief  
from the court of Chan<sup>4</sup>. The Equity is the  
same on both and it is a rule that where  
Equity is equal Law shall prevail.

Such an agreement to convey is on a valua-  
ble and adequate consideration as this,  
will bind the subject as against inter-  
vening judgment creditors, recus if the  
consideration of the agreement is very  
inadequate & because they have not a spe-  
cific lien upon it. It is a general lien  
or incumbrance on the land, but the ex-  
ecutory agreement is a specific lien and  
shall have the priority. This is different  
from a direct conveyance to a third person.  
So also when the bill is to compel a Def<sup>t</sup>  
to accept a conveyance and pay the con-

1 Bult 557  
1 O. Wm 429  
- ss. 282  
- 279

1 O. Wm 282

consideration money Chan<sup>y</sup> will not decree a 225  
 specific performance, where the title of the P<sup>ty</sup>  
 is under an encumbrance, not immediately  
 removable. The damages might be recover-  
 ed at law. It would be inequitable to  
 decree a specific performance, and yet ac-  
 -cording to the rigid rule of the law he must  
 pay damages on the non-performance. 1 Chanc. 175  
 If one person covenant to convey land to 2 P. & M. 201  
 another which actually belongs to a third 2 Dougl. 34  
 person Chan<sup>y</sup> will not compel a specific 10 Ch. 161  
 performance of the contract, yet damages in  
 such a case will be recovered at law.

I have observed that Chan<sup>y</sup> will decree a  
 specific performance of agreements, falling  
 properly within its jurisdiction, & here dama-  
 ges would be given at law; and I have men-  
 tioned some exceptions to this general rule  
 and that there were also exceptions to the  
 contrary branch of the rule viz. that Chan<sup>y</sup>  
 would enforce a specific performance where  
 no damages would be given at law. An



instance occurs in the case of a bond before marriage to convey lands after cohabitation. Now in Law this bond is destroyed by the intermarriage, and of course there are no damages; but Chan<sup>y</sup> will compel a performance of it; as where a Jewess made such an agreement to convey her intended husband's lands, damages could not be given for a breach of this agreement at Law, yet Chan<sup>y</sup> compelled a specific performance of it. The reason is a plain one. It is most obviously improper that a civil action should lay between husband and wife. A recovery, in a court of law is stricti juris, and therefore an execution might issue against her personally. But in Chan<sup>y</sup> the decree binds her property only. She has no process from this court which will act upon her person. The decree acts in rem, and she is bound only to the extent of her property; because she is not liable under the decree as a stranger.

would be. The covenant is considered as bind- 226  
-ing, only as to the subject, and the extent of it  
only, in a court of Chan?

2 Nov. 616

254.7

2 P. Wm. 243

So also in the case supposed of the intended  
wife who contracts to convey lands to her in-  
tended husband, Chan? will decree a spe-  
cific performance of this agreement, tho she  
were an infant if her parent or guardian  
assented to it, and it was made on good con-  
sideration. Another instance of this kind

1 Vent. 68.9

3. Atk. 607

2 P. Wm. 244

is where one lends money to an infant  
to purchase necessaries, and he actually  
expends it in necessaries, now in Eng. law  
this money thus lent is not to be refunded  
by the infant, because his privilege is  
not to be destroyed. But in Chan? this  
infant would be subjected only to the amount  
of necessaries' value and therefore there is  
no danger that his privilege will be in-  
fringed. In Chan? the lender is considered  
as the seller of necessaries, complete justice



2 Nov. 248.9

3 mod. 363

12 W. 558

1 Kent. 68

There is done to the infant, and yet he is sub-  
jected; This is a case in which relief per-  
haps is not specific. So also where the  
agreement is made under the act, of the  
court of Chan<sup>y</sup> itself, that court would  
enforce the contract, tho a court of law  
would give no damages for a breach of it;  
as in the case of a judicial sale of an estate  
in Chan<sup>y</sup>. The Purchaser indeed acts for him-  
self, but the seller acts for the court, it is  
therefore a judicial proceeding. A court  
of comm. law cannot interfere, because  
it never interferes in the judicial pro-  
ceedings of Chan<sup>y</sup> or any other indepen-  
dent jurisdiction. It is common for the  
Chancellor to order the Master to sell off  
estates and incumbrances, so as to give  
effect to his decrees. The sale is called  
a judicial sale. Further, when the con-  
dition of a Bond is destroyed or the bind-  
ing force of a contract extinguished at Law.

2 Nov. 14

by the obligor's becoming Executor to the  
 Obligor. Chan<sup>y</sup> will enforce the contract in  
 favor of those who have higher claims than  
 the obligor; it however could not be en-  
 forced in law. Thus, if in consideration of B's  
 making of his executor, A has this  
 obligation is extinguished because it can-  
 not be enforced. The reason is, the same  
 person would be both Plaintiff & Defendant. A  
 man cannot sue himself, and no man can  
 in this case sue A, but himself. Chan<sup>y</sup>  
 will however order him to pay it to the  
 Creditors or legacies if necessary, for he is  
 considered as their trustee, and Chan<sup>y</sup> <sup>10 mod. 515</sup>  
 having cognizance of trusts decides a <sup>9 mod. 69</sup>  
 performance. Mr. Powell states a distinc-  
 tion where Chan<sup>y</sup> will and will not de-  
 cide a specific performance when dam-  
 ages would not be recovered at law. It is  
 this - if there is a good agreement in sub-  
 stance, but one which is insufficient at



law by reason of a formal defect. Chan<sup>y</sup> will  
decree a specific performance. Ex. case of the  
infant *Jemie &c* at *supra*. But, <sup>where</sup> it is ineffectual  
at law by the non happening of events as pro-  
vided for by the agreement, Chan<sup>y</sup> can give  
no relief. Ex. Husband covenants to settle &c  
on death of his mother and his coming into  
possession, and he never ~~the~~ comes into  
possession. Chan<sup>y</sup> will not decree. Perhaps  
this distinction is proper. The former  
part however hardly conveys the ideas in-  
tended. By formal mistakes are not meant  
mere mistakes in the ~~scribing~~ <sup>writing</sup>. It means  
often an inherent defect in the thing. All  
the cases before mentioned are recited as for-  
mal defects. This is not using language  
as we should use. I have observed that a  
court of Chan<sup>y</sup> will generally decree a spe-  
cific performance, when the subject falls  
within its jurisdiction; yet it is to be observed  
that if the damages given at law would be an  
adequate remedy, they will not generally

2 Nov. 17

12 Nov. 243

3. 4/11. 607

decree. It then falls not within the jurisdiction of the court. If an adequate remedy can be obtained at Law there is no necessity of going into Chan<sup>y</sup> and it is now necessary to state in bill in Chan<sup>y</sup> that adequate relief cannot be had at law else the bill is demurrable. But tho the contract is in its nature such that an adequate remedy might be had at law, if any could be had; yet if under all the circumstances of the case it appears that a court of Law cannot give adequate relief - Chan<sup>y</sup> will interfere whatever the nature of the contract may be. There are certain cases where Chan<sup>y</sup> interposes of course because relief cannot be given at law; there are others where the nature of the contract being such that law cannot give adequate remedy, there too it interposes. Hence it acquires a jurisdiction collaterally. When therefore it is said that Chan<sup>y</sup> will not interfere where

223

1 Font. 28

139

1 Bro. Ch. 341



adequate relief may be had by damages  
at Law, it is not meant that Chan<sup>y</sup> is oust-  
ed of its jurisdiction under all circum-  
stances of the case. Another general  
rule is that Chan<sup>y</sup> will not usually de-  
-cree a specific performance of a contract  
respecting personal property, because a  
court of law can give an adequate relief.  
The damages given are usually an ade-  
-quate remedy, and damages are not to  
be ascertained by the Chancellor's con-  
-science. As it respects contracts for mo-  
-ney, there never is any need of going into  
Chan<sup>y</sup>. This is not an universal rule,  
it must be regulated by the particular  
circumstances of each case, and be qualified  
or modified by this exception, that when  
the ends of justice plainly require a specific  
performance, Chan<sup>y</sup> will decree it, tho it relates  
to personal property, and if the party wishes it.  
The presumption is that damages are an

11 May 447  
1 Eq. Ca. 19  
10 Wm 570

a adequate remedy in a breach of contract respecting personal property but this presumption may be rebutted, into a specific performance required. Thus where A contracted to save B. harmless from certain acts he had to perform, as it respected third persons at different times Chan<sup>y</sup> decreed a specific performance, because justice required it.

If the remedy were to be at law it would require an action by B. for every circumstance against which he engaged to save him harmless. So

the action would first be brought against B. in all these cases and he would then have his action over against A. In another case

where there was an agreement to sell on one part, and purchase on the other 800 tons of iron and payment was to be at different install-

ments, here there might be many actions brought at law, and therefore Chan<sup>y</sup> will decree a performance by which this is prevented, per-

haps too the credit of the purchaser depends on the fulfillment of the contract.

3 Atk. 383  
1 Vern. 189  
1 Bq. Cas. 393  
2 P. W. 217

3 Atk. 383  
1 Vern. 201



Another exception to the general rule is (where  
the contract respects personal property that  
Chan<sup>y</sup> will not decree &c) when fraud is  
mixed with the damages; here Chan<sup>y</sup> will  
decree a specific performance. As where  
there is a claim of damages on one side &  
a counter claim on the other, and a further  
one on the other - As where A brings an  
action at law against B for a breach of  
covenant, B files an injunction against  
A in Chan<sup>y</sup> because the contract was  
made by fraud, now as B has brought him  
into Chan<sup>y</sup> A may file his cross bill and  
pray relief; here Chan<sup>y</sup> if they find no  
fraud may decree a relief. In this case  
damages might have been given. And  
if to a bill brought on a contract of a per-  
sonal nature the Def<sup>t</sup> does not demur on  
the ground that relief ought not to be had  
in Chan<sup>y</sup> but files an answer Chan<sup>y</sup> will  
decree because the Def<sup>t</sup> waives all right to

1 Bac. 69  
526

2 Bos. 116

2 Bos. 215

222  
The objection, and jurisdiction is admitted. Gil. Eq. R. -  
227.  
On the other hand, if the agreement respects  
an interest in lands, or stipulates for some  
act in specie to be done - Chan<sup>y</sup> will regularly  
decree a specific performance, because dam- 1 Bac. 526  
- ages at law are not of course an adequate 1 Font. 27  
remedy. A voluntary agreement however 28  
of this kind will not generally be enforced. 359  
In fact this rule must be understood with the 2 Pow. 219  
qualification before mentioned. If A enters 1 P. W. m. 282  
into articles of agreement with B in which he  
covenants to deed a farm of land to him upon  
sufficient consideration within a limited time  
and afterwards refuses, B will compel him to  
do it i.e. to convey the legal title to him by a  
bill filed in Chan<sup>y</sup>. all that B could do in  
law would be to recover damages, which might  
not be an adequate remedy, and when the re-  
alty is on one side and the personally on the  
other, Chan<sup>y</sup> will decree a specific performance,



2 Nov. 219

by a title filed by either, and this is just and equitable. The same court ought to be open to both and the remedy ought to be mutual. But here I would observe that a covenant, or agreement to entitle the party to a specific performance in Chan.<sup>y</sup> must be specific and particular itself, and hence a general covenant to convey lands without mentioning what lands will not be specifically enforced in Chan.<sup>y</sup> The intended seller is trustee to the intended buyer and therefore the latter has a lien upon the lands; but in this case he has no lien on the lands, because they are not specified. He has no equitable title any more than there can be a legal title in lands not specified in a deed; in fact, there must be an equitable lien. I have been endeavouring to inform you what contracts and under what circumstances a court of Chan.<sup>y</sup> will enforce a specific contract. Further, as a general

17 Nov. 259

10 Nov. 450

rule, he who demands the specific performance 231  
 of a contract must show that he is ready and  
 willing, or has performed his part, or in other  
 words amounting to the same. He who  
 seeks Equity, must do Equity. In a court of  
 law there are what are called conditions, pre-  
 cedent, and those which are called condi-  
 tions subsequent. Now here where the Plff's  
 right of action is to accrue by some act of  
 his own, he must aver performance, or what  
 is equivalent to it. But in Chan. he who  
 seeks the specific performance of a contract  
 must show that he has performed his part, or  
 what is equivalent to it, in other cases besides  
 those where the condition is precedent, or where  
 he is not bound to do certain things. Before a  
 remedy can be had in his favour against the  
 other party. Thus A covenants to convey land  
 to B, who covenants to pay for it. Now at law  
 C may sue B or B, & A, without averring per-



performance. But in this case Chan<sup>y</sup> would not  
decree a specific performance unless there is  
such an agreement, or its equivalent. This differ-  
ence is not founded on a difference in contrac-  
tion in the two courts. It lies in this. The rem-  
edy at law is *stricti juris*. A court of law  
must interpose when such a covenant is broken  
*ex debito justitiae*. But the Chancellor inter-

12 Jan. 383

1 Chanc. 392

1 Ves. 37.

2 New. 19

1 St. 11. 12

poses or not according to his discretion, the  
party therefore must do Equity before he can  
have it. Another general rule under this  
branch of the subject is, that where the ~~off~~  
to a bill in Chan<sup>y</sup> had done a part of what  
he was bound to do and is prevented by sub-  
sequent events from performing the residue,  
he cannot obtain a decree against the other  
party. Thus where A agreed to pay B. £1000  
within two years in consideration that B  
would marry his daughter and settle a jointure  
upon her. B married her, but she died  
before the two years had expired. After her

death B brought a bill in Chan<sup>y</sup> to recover the 232  
money from her father, but the court would  
not interfere and dismissed the bill. The  
Plff here covenanted to do two acts, one of  
which he never performed. True he was pre-  
vented from doing the other by the act of <sup>West 395</sup>  
God, but it was a condition precedent, that <sup>85</sup>  
did him no injury. <sup>1888</sup>  
Ad. Tevershams case is of  
the same nature. A marriage agreement was  
entered into between himself and his father  
in law. He agreed to settle on his wife a  
manor, and to the heirs of their bodies cer-  
tain pensions; he settled the manor and  
before he had settled the pensions she died  
without issue. He then brought his bill in  
Chan<sup>y</sup> to recover £3000 per annum, the sum  
contained in the agreement; but the court dis-  
missed it. He had not done all he agreed  
to do, and altho he was guilty of no blame, <sup>2 Freeman =</sup>  
he was no sufferer by what he had done. <sup>25</sup>  
<sup>Hein. 287</sup>  
<sup>Per Ch. 448</sup>

This general rule however is not to be understood  
without qualifications. There are exceptions to



it, one of which is, where the Ship, having been  
formed in part, and being in no default for  
the non-performance of the residue is not  
in discharge, i.e. where by a performance of a  
part he must be a sufferer by reason of that  
past performance unless he has a decree. This  
was not the situation of the parties in  
the two cases above. Thus where there was  
an agreement between the Freighters and  
Owners of a ship, and it was stipulated that  
there should be a freight only on the homeward  
bound voyage. It happened there were no  
goods of the Freighters at the place specified to  
bring from. A bill was filed against the  
Freighters and a decree framed in favor of the  
owners; for they had performed a part of  
what they promised; they had gone after  
the goods, they had been at expense in man-  
ning and victualing their vessel. Unless  
therefore they could have subjected the  
Freighters, they could not have been in discharge

233  
 11 Jan. 210  
 Dec. 212  
 Sept. 24. 79

quo, they might have been great losses.

I observed by way of general rule that he who seeks the specific performance of a contract, must show that he has done his part or that which is equivalent to it, therefore his readiness to perform is equivalent to an actual performance, and this is the rule both at Equity and law. If then the party seeking relief has been ready to perform, and the other party would not accept performance, and has prevented him from performing, Chan<sup>y</sup> will pass a decree in his favour. But a court of Chan<sup>y</sup> will not decree the specific performance of a written agreement if it has been discharged by parol. It is a general rule that parol evidence is admissible for the purpose of rebutting an Equity and this even against a deed. This rule is peculiar to Equity; but as parol release will not discharge a deed in Chan<sup>y</sup> the Chancellor has a right to interfere by reason of his extraordinary powers i.e. he has a right to

Salk 110  
 Hob. 98  
 2 Bl. R. 1312  
 4 Term. 761



interpose disactionally, and on this ground it is that parol evidence is admissible for the purpose of rebutting an equity. But in the case of a deed suppose the court does not overthrow the deed. The testimony is introduced to inform the chancellor's conscience, whether the party requiring a specific performance, has destroyed his right to Equity by a parol discharge. The Chancellor upon finding this to be the case only refuses to interfere, and leaves the deed just as it was before. The deed is not destroyed, for a recovery may be had upon it at Law, a parol discharge to the contrary notwithstanding.

Thus if A covenants under seal to convey land to B, in six months, B discharges him by parol, afterwards he brings a bill in Equity to compel him to perform; here the parol discharge may be introduced to rebut the Equity, it shows in *pro conscientiae* that he ought to be discharged, Again where the party in Equity claims a specific performance

1 Kent 384

16 Cen 240

2 Atk 68.

220

30 Wm 40

1 Bro. 201

— 328

2 Wm 299

of an agreement he has for many years let lie, 2 B.  
without insisting upon it; he is not entitled  
to a specific performance, unless the delay is  
explained by special circumstances. It is  
presumed he has waived his right. It is  
this presumption cannot take place. Chan.  
raises the presumption, but it cannot on  
this ground vacate the agreement. A differ-  
ent course is pursued by the same, but not a  
different construction. But a delay of this  
kind may be explained by circumstances  
which shall rebut the presumption and do  
away the waiver. In general however it is  
difficult to rebut such a presumption as this.  
But no length of time will prevent a court  
of Chan. from relieving against fraud.  
In general no great injustice is done by  
Chan. Y's not decreeing a specific performance,  
because a court of law will give damages. But  
in the case of fraud this is not true; there is  
no presumed waiver here, for no man can be

2 Kent. 276

454

2 Bro. 260

12 Kent. 321

2 Atk. 610

2 P. W. 82



18 ant. 222 presumed to have acquiesced in fact.

11 mar. 186

I have observed that he who wishes Equity must do Equity; it is to be observed however that the Plaintiff's omission to his part precisely at the time fixed does not bar him from obtaining a decree in Chan<sup>y</sup>; and the reason is said to be that if the rule were otherwise this relief could seldom be given. It is said

10/11/12

4 Bro. 1. 329

18 ast. 26, 27

by Lord Ellenborough that this rule has been altered, that Chan<sup>y</sup> requires more punctuality than formerly. As a court of Equity that exercises its discretion, it is a general rule that if the Plaintiff whose relief has from any back-wardness, in performing his part, he has generally no process from the court, especially if the circumstances are altered so that the other party may be injured. The rule as laid down is that if he has complied with the performance of his part; here you may see the

18 ant. 260

11 mar. 186

33

18 ant. 260

great discretion that is left for the Chancellor in use. But with respect to the necessity of the

Pff. performing his part that he may obtain a 2<sup>d</sup>  
 decree against the other party. There is a great  
 difference between a marriage settlement agree-  
 ments and all others. The general rule that  
 Pff. must have performed his part or done  
 that which is equivalent to it does not  
 apply here. The issue are generally purcha-  
 sors and in their favour a court of Chan-  
 cery compel one party to perform his part  
 altho the other has failed to do his. Thus a  
 covenants to settle property on B his intended  
 wife and her issue. B does the same as it re-  
 spects him and his issue; now B dies without  
 having done what she covenanted to do. The  
 children obtain a specific performance of this  
 covenant from the Father in Chan? The reason  
 is the children are in no fault for the non-  
 performance of the mother. They are as merito-  
 rious purchasers as the mother. Now ordinarily  
 the Pff. who requests a decree in his favour  
 without having done his duty will find for  
 answer, you have not done your duty; but in



his case the children were not compellable to  
do any thing. They were not bound to perform  
what their mother covenanted to do, therefore  
they shall have a remedy. The rule is precisely  
the same as it respects the wife if she is not the  
party. Thus suppose the parents are the  
covenantors and covenantees, the husband  
also a party and the wife not. now the wife's  
father dies without having performed his  
part, or perhaps he is insolvent, shall have  
a remedy against her husband in Chan?   
who will decree a specific performance against  
her husband & t<sup>t</sup> she had to do to entitle  
her to this remedy was to marry. In pursu-  
ing the same subject viz. the power of a court  
of Chan? to decree a specific performance of  
a contract, I would observe that if after an  
executory agreement is entered into a stat.  
intervenes which renders a complete per-  
formance impossible, a court of Chan? may  
decree a partial performance, if the party

Ms. B. 1.45  
1 verm. 377.8  
9 Nov. 26

requests it, and if it can be done consistently  
 with the Stat. Thus where a lease was made  
 by a Corporation for 10 years, and a Stat.  
 afterwards made it impossible to make longer  
 leases than for 10 years - Chan<sup>y</sup> decreed that  
 this lease was good for 10 years; this is enfor-  
 -cing what is called the "cy-pres" as near as  
 may be. In a court of law this could not be  
 done nor any thing like it. If the party had  
 sued at law for non performance, it would  
 have been a good defence to have pleaded that a  
 performance of it was now made unlawful  
 and as a court of law cannot apportion a  
 contract, it must therefore have given judgment  
 for the Deft. The same is true where complete  
 performance is rendered impossible by accident  
 or the act of God. Thus A covenants to convey  
 to B a grove of standing timber and before  
 the grant is actually made, a forest flows  
 down one half. here a court of Chan<sup>y</sup> will  
 compel A to convey the residue and in such

3 Bro. P.L.C.  
 -339-  
 Hunt 709  
 211  
 2 Dow. 631.

1 Bro. 148  
 How. 284  
 Br. C.C. 184



a case they will compel the party seeking a  
remedy to pay in proportion to the part  
performed. This doctrine of cy pres is recog-  
nized at Law when the contract is execu-  
ted. Here a court of law will decree the contract  
to be good and that it shall stand, this, the  
formerly doubted, is now settled. Thus if A  
empowers B to limit certain of A's lands on  
B's wife with remainder upon her if she in  
tail, and the wife should die immediately  
and the party authorized to limit should  
limit it upon the children, this would be  
a good limitation at Law. If it were execu-  
tory, Chan<sup>y</sup> would order it to be enforced.  
This interference of Chan<sup>y</sup> would seem to  
mitigate against the general rule, that a  
contract, the performance of which is render-  
ed impossible and made unlawful by  
Stat. is void: but upon a fair construction  
of this Stat. it goes no farther than to render  
performance unlawful, as in the case of a

2 B. & C. 791  
24 Dec. 1854  
2 Hens. 581  
163  
1 Inst. 219  
352

2137  
lease for 40 years during so long a time. The  
rules are therefore strictly consistent. When  
one acting under a power conveys a greater  
interest than he has a right to convey, the  
conveyance or grant will be good in Chan<sup>y</sup> <sup>Ant. 740</sup>  
for so much as he had a right to convey. <sup>1 Inst. 212</sup>

Thus A has a right to make a lease for 10 years  
and he makes one for 20; this lease is good <sup>2 Inst. 252</sup>  
in Chan<sup>y</sup> for 10 years, tho' at law it is not.

And there is a very material distinction to  
be taken between the construction which Chan<sup>y</sup>  
will give to certain words in an executory a-  
greement, and the construction which both  
Chan<sup>y</sup> and Law will give to the same words  
used in a contract executed. The distinction  
extends to certain cases where real estate is  
limited to one and his heirs general and  
special. Now it is a rule of law settled in  
the time of Lo. Coke that where one conveys  
by grant or devise to A for life, remainder  
to his issue or the issue of his body, A takes  
an estate tail and generally whenever



an estate is limited to me for life and the  
 remainder to his heirs general or special,  
 the person to whom the life estate is lim-  
 ited takes the inheritance, this is the  
 construction given to the words in a contract  
 executed. The reasons why such a construc-  
 tion is given in law are numerous and well  
 founded; for heirs of body are words of  
 limitation not of purchase, of course they  
 cannot take as remainder men and if they could  
 so take, they would take only a life estate,  
 for want of words of inheritance applied  
 to them. If however in executory articles to  
 convey the same words are used as if to c. for  
 life, remainder to the heirs of his body. Then  
 with decree the Covenantor to settle the estate  
 upon A for life, and then upon his eldest son  
 &c, and on failure of issue on his part then  
 to the second son and his issue &c. There is a  
 great difference in effect between the construc-  
 tion of these words in a contract executed  
 and executory. For in the former case he

186. 99

Feame. 25

1 Bent. 394

5 Ann. 299

211

7 Ann. 513

6. do. 30

9. do. 516

2 Bro. 141

189. 6. 391

2 Hen. 658

20. 3. 319

7. Bro. 2. 327

1 Verby. 238.

238  
may defeat his purpose by leaving a fine or suffering  
a common recovery. But in the latter case he  
cannot do it. For the law will follow the in-  
tention of the grantor or deviser generally, not  
particularly. But Chan<sup>y</sup> will so construe the  
instrument as to give effect to the particular  
intent of the grantor or deviser. Now in the  
case supposed where the contract is execu-  
tory A shall be tenant in tail and the gen-  
eral intent of the grantor is followed be-  
cause his children will <sup>most probably</sup> not ~~properly~~ have  
it. But in Chan<sup>y</sup> A shall be tenant only  
for life and his children be defeated of the  
estate, and here the particular intention of  
the grantor or deviser is followed. As the  
authorities themselves do not in the case of  
an executory agreement convey the title  
Chan<sup>y</sup> will do it and so give effect to the in-  
tent of the person making the instrument.  
And they will go further, for it is in pursuance  
of an executory agreement made before.



8. 14. 193

Talbot's 176

10. W. 356 in

acc.

10. 2. 193

10. W. 658

2. P. 349

10. W. 298

8. Atk. 371

marriage settlement should be actually made after marriage. Chan. & will set it aside, and order another to be made, and the reason is, the words in the grant after marriage have a different construction from the same words used in the executory agreement; they do not therefore consider the agreement as performed. But if in pursuance of such an agreement as this before marriage, the settlement should be made before marriage Chan. & will not set it aside, unless the settlement is expressed to be made in pursuance of articles contained in the agreement. Because the parties being under the court with reference, they made a new agreement, but when this presumption is done away by the expression used in the settlement, they will set it aside. It has been said these rules will operate only in favour of males, not in favour of females. There is no reason for this distinction.

256

and it is now denied. In carrying executory agreements into effect specifically, it is a great leading principle that the court of Chancery consider as done that which ought to be done, and that from the time at which the agreement is entered into until some other time is appointed. This rule leads to very important consequences, so that it has been called by Sir Joseph Jekyll the omnipotent rule. Upon this ground it is that an executory agreement becomes a specific lien upon the subject of the agreement. It becomes a lien upon the property contracted about. Hence the vendor is considered as trustee for the vendee, and so are his heirs at his death. Thus where A covenants to convey land to B this covenant forms a lien upon that land. The intended purchaser is vested with the equitable title, and A is considered as trustee for B. True A holds the legal title but B may claim and obtain it out of his

1 Kent 359  
2 Cong 639  
102 W 910



him to by applying to a court of Chancery.  
In pursuance of this great principle, it is set-  
tled that if any person enters into any arti-  
cles, by which he binds himself to lay out  
money in land, or if he devises money for  
this purpose and dies, this heir shall have  
this money as real estate, altho it was never  
actually laid out in lands. It is considered  
as real estate from the time of the articles  
entered into. It makes no matter whether  
the money is by itself, even if it can be iden-  
tified it shall go to the heir.

2 Inst. 88  
2 Atk. 107  
2 Atk. 154  
2 Inst. 336  
1 Vern. 175  
1797

The same rule also leads to this important  
consequence; if a woman before marriage  
has bound herself to lay out money in  
lands, and she marries, and dies before she  
has actually completed the purchase, the  
husband shall be tenant by courtesy of it, &  
then it will order that the sum specified  
shall be laid out in land which shall be con-  
veyed to him for life and then to her chil-  
dren, or it will order that he shall have

the interest of it for life. The reason is found 24<sup>th</sup>  
 150 on some quaint notion, by which it was  
 antiently decided, and it is now become a  
 general rule of Equity yet in this case if it  
 had been husband instead of wife she could  
 not have been tenant in dower of it. In fact  
 a husband may be tenant by Curtesy of a  
 husband estate, but a wife cannot be tenant  
 in dower of one. Further the money thus  
 directed to be laid out in lands will pass  
 in a devise as real property, and on the other  
 hand it will not pass as personal property  
 to a legatee. And it makes no difference in  
 cases of this kind whether the money is ven-  
 dited or whether it forms a part of the ge-  
 neral mass of his personal property, in  
 both cases it is treated as land. I observed  
 above that as Equity considered that as  
 done which ought to be done, of course  
 where money was agreed to be laid out in  
 land, it will be considered as land, but they

2 Vent. 36  
 195  
 1 P. 200.

4. 56. 310  
 12. 11. 172  
 3. do. 221  
 20. 10. 1



sent to his wife, the agreement be pos-  
itive. So if I trust money to another to  
remain in his hands, till it might be laid  
out for his daughter, the daughter died  
and it was holden that the money was still

1 Vern. 221

1 Atk. 155

personal property because there was no  
express agreement. Thus if a man should  
enter into an agreement to vest a certain  
sum of money in the public funds or in  
land for his son at the election of his  
son, and before he makes it he dies, it will  
go to his Executor as personal property.

2 Atk. 258

1 Vern. 298

All these rules hold e converso; for if a  
man having land agrees to sell it for money  
and dies, it shall go to the Executor, as the  
profits of it, as personal property and not  
to his heirs. This is in pursuance of the great  
principle that a Court of Chan<sup>y</sup> consider as  
done what ought to be done. It follows  
from this general principle, that after an  
agreement for the sale of property such  
an one as Equity will enforce the vendor

2 Vern. 649

1 Atk. 154

1 Atk. 414

under the articles shall be liable for all the  
contingencies, which happen to the property  
from the time the agreement is entered into,  
the vendor being in no fault. Thus where  
one covenanted to convey a plantation in  
Jamaica, and before the conveyance was  
made, the great Earthquake destroyed it;  
it was held that the intended purchaser  
should suffer the loss. A made an agreement  
to take a lease from B for three lives and  
take a conveyance at a certain time and  
before the time arrived one life failed; a  
specific performance was refused in Chan.  
The ground is, from the time the articles  
are entered into, the purchaser is considered  
in Equity as the owner, and the seller as  
the owner of only the consideration money.

22 Wm 411

1 Str. 41

1 Bul. 156

2 Wm. 64.5

There is a case in 2 P. Wms 217 where Sir Joseph  
= Jefferies seems to deny this doctrine in general;  
but it is a mere dictum. He there refuses to  
decree a specific performance of the contract,  
because it was a matter of moonshine, a



money 457. piece of rounding. There is one of these cases  
from which it would appear that this doc-  
trine was denied, but from an examination  
you will find there is nothing in it contra-  
dictory. Powell remarks if the contract is  
not properly a contract of sale, but merely  
a contract for a future agreement, with  
respect to the subject, the property is not  
changed in equity: and these consequences  
do not follow from it. By this is meant  
where the agreement is that one of the par-  
ties shall have the presumption or reversion.  
With regard to the rule that money, entitled  
to be laid out in land is regularly considered  
as land from the time of entering into  
the articles; yet it is to be observed that if  
he who is to have the land when purcha-  
sed is to be tenant in fee simple of it, he  
may at his election retain the money or  
have it laid out in land as he pleases. Thus a  
covenant to appropriate \$1000 to purchase  
land in fee simple for his son, now if the son

dies, his heir or son will have the money; still that  
the son may waive the agreement if there  
is no objection from the opposite party, and  
if he does so, and dies the money will go to  
his Executor. In this case there are no third  
persons who are to be injured; but in the case  
of a Trust it is different, for the issue and  
remainder men have a claim. But still to  
take the case out of the general rule, even  
when he is to be benefitted by the purchase  
who would be tenant in fee simple, he must  
show his election to consider it as money,  
for if he does not decide it; and a contention  
arises between his heirs and his Executors  
it shall be considered as land. It is necessary  
then that in some way or other he manifest his  
election. Thus if he declares in his will that  
it shall go to his Executor, it shall go; so  
if he devises it away as so much money,  
appropriated for the purchase of land, it  
will go to the legatee; so far as proof  
of fact, or his own declaration that he in-



tened it should not be ascribed to the  
purchase of lands in evidence of his intention.  
So if he has received part of the money, for  
this is to rebut an equity. This election is  
confined to the tenant in fee simple, it is per-  
sonal and dies with him. As between his real  
and personal representatives one cannot make  
an election in preference to the other. These  
are the leading distinctions on this subject.  
I observed that this general principle viz.  
that property is considered as transferred  
from the time of entering into the agreement  
only in those cases where a court of Chan<sup>y</sup>  
will decree a specific performance. A want  
of mutuality in an agreement is a decisive  
objection to a decree for a specific perform-  
ance in Equity; so is uncertainty in the  
terms of it which would make it void at  
at Law also; tho at Law more certainty is  
required; thus where A agreed to sell an  
estate to B for 1500 £ less than to any other  
purchaser, and B did not bind himself to

2 P. W. 195.

3. 20. 221.

note.

3. 114. 256.

13. 64. 223.

2 P. W. 117.

take it, upon a bill of specific performance 245  
it was dismissed for two reasons. 1<sup>st</sup> For want of certainty; no one knows how much less £1500 is than what any other purchaser would give. 2<sup>nd</sup> For want of mutuality; B has not bound himself to take the land. But if the agreement was originally mutual no subsequent event which occasions a want of mutuality, however hard it may be will prove an objection to a decree for a specific performance. This is evident from the cases cited before when the subject of the contract was wholly destroyed. And where the agreement was to convey an estate in consideration of an Annuity and before the first installments became due the annuitant died - Chan<sup>y</sup> ordered the parties to convey the estate. And where there was an executory agreement for the sale of stock and an enormous premium to be given, stock being high, and before the conveyance was made it fell to par a specific perform-

Per 234  
Linn 415  
Eq. Ca. 107

2 An. 132  
L. R. 10.  
102.  
181. 616



ance was decided in Chan<sup>y</sup>. Thus far with res-  
pect to the power of Chan<sup>y</sup> to enforce the  
specific performance of executory agreements.

### Penalties

I observed that in general Chan<sup>y</sup> will not suf-  
fer an advantage to be taken of a penalty, as  
they consider it only as the means of enfor-  
cing the contract. Hence this it is laid down  
as a rule <sup>that</sup> when <sup>there is</sup> application to Chan<sup>y</sup>  
for a specific performance of an agreement  
the non-performance of which may incur a  
penalty, it is necessary for the Plff in the bill  
expressly to waive the penalty else the bill  
will be demurrable. To such a bill the Def<sup>t</sup>  
is not bound to answer, and the reason seems  
to be this, that if he answered and confessed  
a violation of the contract, the Plff might  
resort to law, and upon the confession of the  
Def<sup>t</sup> in Chan<sup>y</sup> obtain the whole penalty.

1. Ann. 60

2. Pow. 204

The reason is not because it is necessary to  
waive the penalty that Chan<sup>y</sup> may not en-  
force it, for this they never do.

It is not universally true that Chan<sup>y</sup> will not  
allow advantage to be taken of a penalty.  
Where the substance of a contract may be  
enforced without a penalty they will relieve  
against it by an equitable injunction if neces-  
sary, and in such a case will never enforce  
it; as in the case of a penal bond - There  
Chan<sup>y</sup> upon payment of principal, interest,  
and costs will order the obligee to desist  
from an action at law on the bond.

2 Prob. 311

1 Pow. 171

2 Atk. 520

2 Vern. 316

— 289

4 Burr. 2228

But when does it happen that the substance  
of the contract can be enforced without the  
penalty? I observe that in general whenever  
a compensation can be made for a breach  
of the condition according to a clear rule  
of damages, the subject of the contract  
can be enforced; as in the last case of a  
penal bond; so in the case of a mortgage.  
This is not considered as a purchase, but  
only as a pledge. It is the accident; the  
payment of the money is the principal.  
There then the object of the parties is ob-



7 Par. 20.  
— 52.

inured by the payment of the principal  
interest, and costs. I observed that Equity  
would not suffer a damages to be taken  
of the penalty, when the subject of a contract  
could not be enforced; and the subject of  
a contract could not be enforced where there  
is a clear rule of damages. I would further  
observe where there is no rule of damages  
a court of Chancery cannot relieve against a  
penalty. In such a case there cannot be  
any compensation according to a clear  
rule of damages; no where a lessee com-  
mits not to alienate without the consent of  
the lessor and a penalty is annexed viz.  
a forfeiture of the lease. Here if he does  
alienate, he forfeits his lease and Chancery  
cannot relieve against it, because in this  
case, there cannot be any clear rule of  
damages. Yet if there is a rule of damages  
and by reason of intervening events no  
compensation can be made as a substitute  
for the penalty, Chancery cannot relieve

7 Colled 112  
2 Par. 105

against it, at which it is marriage act. 245  
-cles agreed that if he did not settle a jointure upon her within two years he would forfeit his marriage portion, and if he died before the two years expired, here the jointure would be the rule of damages, yet the wife is not at liberty to receive the compensation. According then to the rule then laid down, if there is no rule of damages by which a compensation may be made, or if there is a rule and yet there cannot be a compensation by reason of intervening events - then I cannot relieve against the penalty. These rules are not independant of the general rule, but subservient to it. When one party voluntarily stipulates an advantage as a favor to another on certain conditions, the latter must lose all advantage from the stipulations, unless he strictly adheres to the conditions. But they operate penally. Thus if a creditor agrees to take less than



The amount of his debt; provided the debtor  
will pay it at a certain day, he must pay  
it on that day or he loses all advantage  
from the agreement of the creditor. The  
stipulation on the part of the creditor  
is pure & gratuitous. The condition is in the  
nature of a penalty, but the penalty in this  
case does not like & these operate unjustly,  
altho' shan't will compel a man to be just in  
spite of a penal bond, it will not compel  
him to be benighted. It is also a general rule  
that when a court of Equity will relieve against  
a penalty in favour of one party, it will de-  
cline of course a specific performance in fa-  
vour of the opposite party. And on the  
other hand where it will not relieve against  
a penalty, it will not enforce a specific  
performance. This is founded on principles of  
justice. As the court of Chan<sup>y</sup> deprives the party  
of the advantage he might take of the penalty  
at law it will compel the other party to do

1 Hen. 2. 10

Barnard-

481

2. Ch. 160

1 Hen. 4. 56

him justice. i.e. to perform his part of the ag- 246  
reement. So if A. covenants to convey land  
to B under a penalty. A has<sup>9</sup> with respect to ag.  
the penalty and at the same time covenanted a spe-  
cific performance. So on the other hand it will  
not decree a specific performance when it will  
not relieve against the penalty; because the  
penalty is the substance of the agreement and <sup>12 Vent. 441</sup>  
therefore good every where. Justice does not  
require that relief should be had against it.  
The party can enforce the penalty at law which  
being the substance of the agreement A has<sup>9</sup>  
would not interfere, because it would give <sup>12 Vent. 111</sup>  
the party a double advantage. It was for-  
merly holden that when an executory agreement  
contained a penalty, the party bound had  
his election to do the thing agreed to be done,  
or forfeit the penalty: and this is now the rule  
at Comm. law. He may now the one or the other.  
But this is not at present the rule in Equity.  
It is thus laid down by Lord Tenterden "where



The penalty seems to be a security for the performance of some thing collateral, so that the enjoyment of the collateral object, seems to be the thing intended to be secured, Chan.<sup>4</sup> will relieve against the penalty on one side, and enforce performance on the other. This rule must be understood with the qualifications before mentioned viz. whenever the circumstances are such that performance on one side cannot be enforced, without the penalty Chan.<sup>4</sup> will not relieve against it: as to the general rule see the use of a penal bond which is merely inter-  
coram; so in the case of a mortgage which is in the nature of a penalty.

Relief is generally had by an injunction ordering the party not to sue for that penalty at Law. This however is not done unless the other party do as he is bound to do. But when the sum to be paid on the non-performance of the agreement is in the nature of a pep'd claim

1 Br. 6 418  
3. Bac. 691  
1 P. 171  
Dong 431  
2 P. 136  
2 R. 191  
2 M. 371  
2 Wey. 538.

ages a court of Equity cannot relieve against it. In such a case as this, the penalty is not considered in the nature of a security for the collateral object, but as a compensation for the loss of it. In such a case as this the party bound by the agreement has his election either to perform the agreement or to pay the sum stipulated, as a compensation for the non-performance; here the common law rule applies.

1 Pont. 142  
6 Br. & C. 417  
2 Wemy. 114  
1 Term 32

Thus where in a lease, the lessee covenants to pay £5 for every acre of meadow he shall plough. Chan<sup>y</sup> cannot relieve against it; because from the structure of the agreement it was evident that the election was to be in his part. This sum is in the nature of liquidated damages. In such a case Chan<sup>y</sup> will not decree a specific performance, nor enjoin the party not to plough. But if the lessee covenants thus "I agree for myself &c not to plough meadow" and at the close of the agreement a penalty is annexed, here Chan<sup>y</sup>

4 Burn. 2228



4 Burr. 2228

would enjoin the party not to plough and if he should plough on the same principle it would relieve against the penalty. Thus much of the nature of a difference between a penalty properly so called, and a sum in the nature of a specified damages. Whether the sum is one or the other of them depends upon the construction of the whole instrument. The object must be seen, and its good sense consulted. I observed that at common law when an action was brought for a penal sum due the whole sum would be given: The Comm. law knows nothing of chancing penalties. But now by Stat. 3<sup>rd</sup> and 4<sup>th</sup> Wm. 4<sup>th</sup> c. 27. and 4<sup>th</sup> and 5<sup>th</sup> c. 10, Courts of law are in

1 Bac. 544

6 W. 35.

3 Bac. 691

1 H. B. 180

Laws 2. 25.6

certain cases allowed to chance penalties; the penalty is usually double the sum due: it is easy then to ascertain the damages.

In this State penalties have been chanced in Courts of law under the Equity of a Stat. Stat. c. 27. When a court of Equity relieves

against penalties, if frequently orders an issue 248  
quantum damnificatum at Law and decree  
according to the verdict. In many cases this  
is not necessary, but in many it is absolutely  
necessary. 1. Generally for breach a non-performance  
of conditions, a whole the damages are Sid 442  
in any degree presumptive. In this case 2. Per 114  
the Chancellor never does and indeed cannot  
assess the damages.

I have been considering the cases where Chan<sup>y</sup>  
sets aside the specific performance of con-  
tracts; but a Court of Equity too possesses the  
power (and exercise it) of setting aside ag-  
reements in certain cases. I would here  
observe that when Chan<sup>y</sup> sets aside an ag-  
reement, the relief is specific. At Law where  
a contract has been unjustly obtained after  
the court had enforced that contract it will  
give the party damages, but Chan<sup>y</sup> will set



it aside, and the relief is therefore specific.  
Suppose a bond is fraudulently obtained from  
another, here, in a court of law fraud does  
not vitiate it, but a recovery may be had upon  
it. Still a court of law will give damages  
for the deceit practised. But in Chan. an in-  
junction will lie to prevent an action  
on that bond. The remedy in this case  
is superior. It does not follow however  
from a court of Chancery's refusing to decree  
a specific performance that the court will  
grant relief against the same contract.  
As if A claiming under an agreement,  
presents a Bill for a specific performance,  
and it is dismissed, it does not follow that  
B by a bill may have this agreement  
set aside. At Law it is not so. The contract  
is enforced or destroyed, always there if upon  
a judgment upon the merits. I cannot

refuse to interfere; but at times it is discretionary 249  
 with the Chancellor to interfere or not. There are  
 many cases where there is no intervention. Thus if  
 when a bill for the specific performance of an  
 agreement it appears to the court to be un-  
 reasonable on the part of the plaintiff it will  
 never decree a specific performance altho it is  
 not attended with fraud, and then they will 2 Pow. 143  
 not decree. They cannot set aside the agree- 295  
 ment. There are many more cases where it 290  
 will refuse to decree a specific performance, 5 Price 549  
 than there are where it will set aside the  
 agreement. Fraud in obtaining a contract  
 is a good ground for setting it aside, and un-  
 reasonableness, tho it will not set it aside, 2 Pow. 145  
 yet it is often times evidence of fraud. At law 2 P. & M. 288  
 every species of fraud will not set aside a con- 300 M. 290  
 tract. Even in the case of executory contracts 2 K. & J. 356  
 by fraud, a court of law cannot refuse to carry 2 M. & K. 124  
 1 M. & K. 624.7



them in to effect by reason of fraud in the con-  
sideration. As if A buys goods of B and by  
reason of B's misrepresentation gives him more  
than double the real value; upon an action  
for the price of these goods it will be no bar  
to a recovery that misrepresentation was  
used. Chan<sup>y</sup> will relieve against other contracts  
except fraudulent ones. Thus it is a general  
rule that it will relieve against contracts  
obtained by improper hardship tho there is  
no fraud or deceit in the case, as if the mort-  
gagor and mortgagee agree that if the inter-  
est is not paid at such a time as semi-annually  
the interest shall be added to the principal  
and become principal itself. Chan<sup>y</sup> will re-  
lieve against this. But if such an agreement  
as this is made, as between the mortgagee and  
mortgagee and it is afterwards prob<sup>ly</sup> satis-  
fied by the mortgagee, he knowing the extent  
of his rights, that he can be relieved against

2 alk. 41

2 alk. 1149

2 Mo. 145  
138

it, it will not be set aside. The agreement is <sup>256</sup>  
not void but only voidable in Equity. <sup>24th 152</sup>  
<sup>38.2.294</sup>

In a court of Law a contract obtained by any  
degree of coercion not amounting to duress is  
good, but in a court of Chan<sup>y</sup> any degree of  
coercion so as to excite the fear of one of the  
parties, and cause him to act under the im- <sup>2 Nov. 163</sup>  
<sup>146</sup>

pression of that fear, if it does not amount to  
duress, will set it aside. A court of Chan<sup>y</sup> will relieve against a contract which  
if oppressive is also unlawful; a every unwise  
contract is. There are two grounds, for relieving,  
unlawfulness, and hardship. But the rule  
is different as to illegal contracts when both  
parties are equally guilty; the maxim here  
is volenti non fit injuria. The court of Chan<sup>y</sup>  
reluctant in such a case i.e. this court will  
go no further than a court of law, as in the  
case of gambling. Both parties are here in  
the wrong, but in the case of an unwise



Co. 200  
10.1.98  
22.11.150  
2.2.150  
Talk. 41

1.11.95  
1.11.95

1.11.95  
1.11.95  
1.11.95

contract but one party is criminal, the law  
The law does not deem the borrower guilt-  
ty. And in general and unfair practice on  
the part of the Plff. to the disadvantage  
of the Def. will prevent a decree in his favor.  
The Plff must come into Court with clean hands.  
Now, where there is a misrepresentation as to the  
value of the subject of the contract, the court  
will not enforce it, but on the other hand  
will set it aside. And a suppression of a  
material truth to the disadvantage of one  
of the parties, forms a strong objection to a  
decree in favor of the other party, as the  
suggestion of falsehood. Suppression est sug-  
gestio falsi stands on the same ground, as  
when A wished to sell land to B, B wished  
to buy it, A represented to B that it yielded  
£40 rent which was true, but the land re-  
quired an annual repair, which was not  
told to B. And as B had no means of know-  
ing it, then A refused to decree a specific per-

257  
-insurance. The case of this kind are when the  
(off) has brought a bill for a specific performance  
but I should suppose that if a bill were brought  
to set the contract aside, it could not be granted.

So also in some cases where the parties act under  
a mere misapprehension, or misconception  
without any fraud or unfairness on either  
side. Chan<sup>y</sup> will not only decree a specific per-  
formance but it will set aside the contract  
on a bill brought for that purpose. As where  
an agent to sell an estate sold it at less value  
by a mistake in the quantity of interest. It was  
a free hold and it was sold as a lease hold.

The rule on the subject however is, if the fact  
misconceived is the cause of the agreement, it  
will be set aside; but if it is such a mistake  
as could not have prevented the contract from

2 on 3 B. & Ch.  
6a-226  
1 on 225  
11 on 400

being made, as it was made, it will not be set  
aside. There is another case which is a very  
strong and singular one. It appears to me the  
misrepresentation here arose from an igno-



- cause of law and in such a case Chan<sup>y</sup> will not  
generally interpose. The case is this. One of four  
brothers died leaving a considerable estate. The  
elder brother claimed the estate as belonging  
to him and the younger brother claimed it  
as belonging to him. They agreed to leave it to  
a Schoolmaster who having read in a book  
that inheritances always descended gave his  
opinion in favour of the younger brother: in  
consequence of which the elder brother con-  
sented to an agreement to divide the estate  
with him; afterwards being better advised, he  
brought a bill in Chan<sup>y</sup> to be relieved, and  
relief was granted him. This is contrary to  
the general rule both in Law and Equity, for  
if an agreement was written differently  
from what was intended by the parties,  
relief may be had against it in Equity, but  
if there is a misconception in law, relief  
cannot be had. At gain it is a general rule

Monley 464  
2 Dec. 1796

that a court of Equity will not enforce a voluntary agreement. Such a one is not binding at law. The interference of Chan<sup>y</sup> is for the sake of giving more a dequate relief than a court of Law would do. But in this case a court of Law could give no relief, therefore Chan<sup>y</sup> will not give any, because it is a general not-universal rule that Chan<sup>y</sup> will not decree where Law will give no relief. But the compromise of a doubtful right is a sufficient consideration to support an agreement, and where there is such a consideration the agreement in Equity is never considered as voluntary. Thus if an agreement is entered into between two persons to settle the boundaries of their land. Chan<sup>y</sup> will decree a specific performance. This was the case with Lord Baltimore and Gov. Penn, yet there is no agreement to convey land or pay money, and it would seem as if the agreement were voluntary. This case may perhaps strike

1 Bro. 34  
2 Bro. 242  
1 Atk 10  
1 Bro. 789  
1 Atk 10  
1 Bro. 726  
2 Bro. 750  
1 Bro. 122



the mind as being analogous to the case of the  
 Schoolmaster. But still these two cases stand  
 on different grounds. A mistake in law is  
 different from the compromise of a doubtful  
 right; for in the latter case it may not be  
 a matter of law, but a matter of fact which  
 is doubtful and if it were a matter of law  
 like it would stand on different grounds,  
 in the case of the Schoolmaster the ground  
 of the eldest son's executing the contract  
 was a mistake in law; but the ground in  
 case of a doubtful right is very different.

It is a rule of Equity that agreements ob-  
 tained by coercion not amounting to du-  
 ress may be set aside. Thus where upon  
 a treaty of marriage between A and B,  
 B being a minor, and her guardian would  
 not consent to the marriage unless the  
 husband would release to him the habili-  
 ty for the mesne profits of the ward's es-  
 tate - he did it, and Chan<sup>y</sup> set it aside.

2. Aff. 987  
 292  
 1. Aff. 10

10. Wms 118  
 1. Aff. 11  
 10. Wms 699  
 1 Br. G. 634  
 — 364

But more filial fear, reverence, or respect is not  
 of itself a reason on which relief may be had. 252  
 But if this reverence should be made use of for  
 the purpose of obtaining the contract, it would be  
 set aside. Intoxication in a party at the time of  
 entering into the contract is not a sufficient  
 ground for setting it aside, unless the party claim-  
 ing benefit under the agreement induced the  
 intoxication for the purpose of obtaining the  
 agreement, the ground of relief would then  
 be the fraud used, and not the intoxication  
 per se, and if one party should get the other  
 intoxicated and then make a contract with  
 him, altho it would be a fair one then?  
 will not induce it because he comes into them  
 with polluted hands: and I suppose then  
 would set it aside on the ground of fraud  
 again more weakness of understanding if the  
 party be legally competent is not per se  
 a ground for setting aside the contract.

The Common Law cannot discriminate between

Ham. on  
 Cong. 19  
 3 P. W. 130  
 much  
 1 Rev. 29



the shades of intellect in men. The inquiry in  
a court of law is not whether one party had more  
understanding than the other. The rule estab-  
lished by law is that if he is legally quali-  
fied or competent in his own mind of under-  
standing shall not be the ground of relief.

30 Nov 129

10<sup>th</sup> Nov 32

There must be some standard, else the decis-  
ion would be vague and uncertain. Yet  
want of understanding may be presumptive  
evidence of fraud. The only difference there  
between a contract made by this man and  
any other is, that in the *Prince* case Chan-  
cery will give relief upon slighter evidence than  
in the latter case. It is to be observed that  
agreements operating as a fraud upon third  
persons are always set aside in a court of  
equity. And this is one of the strongest  
grounds for which Chan-<sup>y</sup> will set aside con-  
tracts, and such an agreement is now void  
at law. Thus when in an agreement in con-  
templation of marriage the father is one

side agrees with the father on the other, to set- 254  
 the £1000 if he will do the same. Now if there  
 should be a clandestine agreement on the  
 part of one of the parties to the marriage  
 as the son, to release a part to the father.  
 This agreement is void, it is illegal for  
 it is a fraud on the other party. And  
 when upon an agreement with a Bankrupt  
 the Creditors agreed to take 10 shillings on a pound  
 and the Bankrupt to induce some more  
 rigid, to agree to this, covenanted to give  
 5 more on the pound. This agreement was  
 void at law - it was a fraud. Contracts of  
 this kind do not admit of a subsequent  
 verification. They are void ab initio, void  
 because if they could be ratified they might  
 impose a fraud upon third persons. When a  
 fraud is practised by one party to an agree-  
 ment on the other party, the other may  
 ratify the agreement if he pleases; but a  
 fraud imposed upon third persons in an

1. B. & C. 156  
 2. B. & C. 165  
 116  
 1. B. & C. 88  
 1. B. & C. 348  
 2. B. & C. 375  
 1. B. & C. 395  
 286  
 4. B. & C. 166  
 2. B. & C. 163  
 1. B. & C. 332  
 20

Authorities  
 where

2. B. & C. 178  
 B. & C. 602  
 498  
 3. B. & C. 75



1237490

agreement never can be ratified. There being  
a treaty of marriage depending, there was an  
objection on the part of the intended husband's  
relations, because the wife's portion was not large  
enough. It was agreed by her father that he  
would amount to her a bond for £500. It  
was done and she clandestinely gave an instru-  
ment by which she agreed to deliver up  
the bond. In fact she gave a release of it.  
The bond had its effect; the parties were  
married. Afterwards the husband brought  
his wife to set aside the lease and it was  
set aside. In this principle marriage  
Brogage bonds and contracts are void.

There are such as where one party agrees to  
give the other such as when if he will procure  
a certain person to marry him. They are  
void because they tend to fraud and undue  
influence and misrepresentation. Strangers  
should not interfere in such things. I believe  
at law they would be void.

1. Burr. 474  
475

1. Cont. 245

Contracts with heirs apparent for their estates  
 are always set aside in a court of Chancery. Formerly  
 they would not set them aside unless the  
 terms of the contract are disadvantageous to  
 the heir, but the rule is now altered, they  
 are radically defective and it makes no dif-  
 ference whether the heir apparent was an  
 infant or not i.e. an adult at the time of  
 making the contract. This rule is founded  
 on considerations of general policy. These  
 contracts tend to dissipation and lead to  
 vice. They render heirs independant of their  
 ancestors and excite rebellion against parents  
 and after the death of the ancestor the heir  
 apparent should perform the contract by actu-  
 ally conveying his inheritance. Courts of Chan-  
 cery in many cases set it aside, tho not  
 always. And the rule is if the original contract  
 is shown to be fair and it appears to be ratified  
 fully, and the heir has knowledge that it might  
 be set aside, the satisfaction will not be set aside.

255

2 Pow. 151

2 Pow. 14. 27

12 Wm. 310

2 Co. 292

2 Vern. 128

12 Wm. 320

2 Vern. 149

3 Wm. 292

2 Wm. 4



2 Dec 193 otherwise it will be. I am in general a lover of  
Chanc<sup>y</sup> & it will not enforce a contract to do anything  
which would tend to oppression, extortion or  
immorality. The thing itself need not be immoral  
if it would tend to immorality it would not  
be enforced, and I should think upon a bill  
for that purpose it would be set aside. The case  
cited to establish the rule is one where the  
Pl<sup>y</sup> wished to enforce a contract and the  
Chancellor would not enforce it. In the same  
case the contract was stipulated for an as-  
signment of the Tapsie's office, this was not en-

2 Dec 238

2 Dec 259

forced because it tended to immorality, deun-  
-damp &c. Thus far of the powers of Chan<sup>y</sup> to  
vocate or set aside contracts. Chan<sup>y</sup> exercises  
the power of decreeing a set off, a thing un-  
-known to the common law. At law the con-  
-tracts are entire and distinct, as where A  
owes B, \$100 by note and B owes A \$100

3 Bl. 304 by simple contract. Now in an action by A. B  
14 Dec 123  
6. do 456 cannot at common law, plead a set off of his  
conf. 56

2 Hen 3. 440  
100. 65

debt of £100 by note. By two Stat's 2<sup>d</sup> and 8<sup>th</sup>  
George 2<sup>d</sup> he can thus plead; but Chancery  
can decree a set off. The set off's are especially  
necessary where one of the parties is insolvent.  
Chan<sup>y</sup> will not always however decree a set off.  
In Loure<sup>t</sup>. Chan<sup>y</sup> is in the constant practice of  
decreeing set off's. It is impossible for a court  
of law upon any principle of common law to con-  
sider a set off as a defence. They have only  
to consider whether the contract was made,  
whether it is good, and whether it has been  
discharged; because the Deft has a debt  
against the Plff. This is no payment or  
discharge of the Plff's debt. Under our  
Stat. law on the subject of Chan<sup>y</sup> proceedings,  
original proceedings in Equity are to be brought  
before the general c. & prob. t. when the thing  
demanded exceeds £100 or 95435, between  
this sum and £100 Sup. court take notice  
of the proceedings, under £100 Chan<sup>y</sup> court.



I believe there is no case brought before the Supreme court where there was any objection that the sum was too large. Indeed the provision in the Stat. book that the General Assembly shall have the cognizance of suits over \$1600- is a disgrace to it. In our Chancery proceedings there is no appeal from one court to another but a writ of error will lie.

In England there is no writ of error but an appeal. Where the value in question is doubtful, the alleged value determines the jurisdiction.

### Power of Chan<sup>y</sup>. to issue injunctions.

The nature of an injunction has not yet been explained. An injunction is a prohibitory writ, the object of which is to restrain a person from doing a thing which appears to be contrary to equity and conscience. Injunctions are issued in a variety of cases. The most usual writ of injunction

is that sued against a Bill to stay proceedings, 2. 1  
 in some suit at law, and this issues upon some  
 equitable ground not-adverted to in the courts  
 of law i.e. upon some grounds upon which  
 a court of law cannot take notice. As in  
 the case of a penal bond which is sued at  
 law. The Dett<sup>r</sup> may bring a bill in Chan<sup>y</sup>  
 praying that an injunction may issue 3. Bac 173  
 to stay proceedings upon his paying prin-  
 cipal, interest, and costs. But Chan<sup>y</sup> can  
 issue no injunction in any criminal case  
 whatever. The rights enforced in Chan<sup>y</sup> and  
 the wrongs redressed are civil rights and 6 mod. 16.  
 civil wrongs. A court of Equity may issue 3. Bac 173  
 an injunction to stay waste i.e. cutting timber,  
 demolishing buildings, &c. A court of Com-  
 mon Law can only give damages for committing  
 waste, but Chan<sup>y</sup> can give a preventive remedy.  
 The damage given at law may be very inad- 3. Bl. 438  
 -equale. This injunction may issue either in 1. Kent. 29  
 favour of the remainder man or reversioner. 2. Com. 51  
 1. Bro. P. 57



But an injunction to stay waste will issue  
not only in those cases where an action of waste  
will lie at common law but in many others. & 4/  
Common law waste lies only for the immediate  
remainder man or reversioner. In Chancery remote  
one may have the injunction. The reason in  
the former case is, if it would do at law, the  
remote remainder man would destroy all  
the intermediate remainder men; for he  
would receive the land. But in Chancery the  
land is not recovered, the injunction is a  
preventive remedy. It does not put the re-  
versioner or remainder man into possession  
of the lands. An injunction to stay waste  
will issue in Chancery in case of a mortgage.  
A mortgagee in possession can never be sued  
by the mortgagor in an action of waste, for  
he may commit waste. But in Chancery the  
mortgagee has only the equitable estate,  
and therefore he cannot commit waste.

31. 227  
Term 23  
3c 11c. 94  
Do. 723  
Heame. 450

at a injunction with of course issue to stay 258  
waste, and I should suppose (in the case of  
timber for example) even if it were to be cut  
down and applied to the payment of the  
debt, it would be the foundation of an <sup>2 Com. 51</sup>  
injunction; at any rate if timber is not <sup>3 Atk. 723</sup>  
so applied, the injunction with issue. On the  
other hand an injunction with issue in fa-  
vour of the mortgagee against the mort-  
gagor. An action will not lie at Comm. law  
because mortgagee is considered as tenant  
at will. Of course when he comes to waste  
he immediately determines his estate. He  
is then a trespasser, all priority of estate  
being gone. But Chan<sup>y</sup> will issue this in-  
junction; for the mortgagor has no right  
to diminish the pledge. but a remedy <sup>3 Atk. 723</sup>  
may be given at law by suing in an action <sup>12 Sim. 752</sup>  
of Ejectment, but this might be inadequate.  
Again, an injunction against waste may



issue against tenant for life, without im-  
peachment at waste is the case may be.

1000. 23

1000. 23

1000. 23

1000. 23

1000. 23

At common law no action of waste would lie

without impeachment, of waste. For cutting timber

an injunction will not issue; it will issue only

for great and outrageous acts of waste. And in

a case of this kind, if he has committed

waste by demolishing or partly demolishing

a building Chancery will decree a specific re-

lief for the injury done by ordering him

to repair the buildings and put them in the

plight in which they were. And an in-

junction ~~may~~ sometimes issue to stay waste

against him who has the inheritance at

common law as a trustee. Now at common law

the action of waste lies only in favour of

him who has the inheritance against one

who has only the estate for life or years.

But the trustee has the inheritance, because

the cestui que trust is not known at law;

2400. 736

Pro Ch. 454

69. Ca. 400

his title is a mere Equity, and as it is so Chan<sup>y</sup> 259  
 will order the trustee to perform the trust as  
 to the conveyance the legal title estate or to stay  
 waste, which prevents him from violating 2 Lem 51  
 the trust. An action at law will not lie  
 against a tenant in tail after possibility  
 of issue extinct; but Chan<sup>y</sup> will in this  
 case issue an injunction to stay waste. This  
 man is in the same plight with a tenant  
 for years, with impeachment of waste. If 1 Eq. Ca. 221  
 the waste is outrageous, an injunction 2 Lem 502  
 will issue. Injunction may also issue to re-  
 -strain a nuisance. As if one is about to raise  
 a building that will obstruct ancient lights,  
 an injunction will issue to prevent it.  
 At law when the building was raised down-  
 -ages might be given. The lights must be  
 ancient or no remedy will be had either in  
 law or Chan<sup>y</sup>. Ancient lights are those which  
 extend beyond the memory of man. The



2 Decy. 452

1 Feb. 129

28 Nov. 266

1 Decy. 458

right must be founded on prescription or agreement of the parties or those under whom they claim. It may be here observed that tho' the rights are not in point of best ancient rights within the term yet when one has built and his rights look upon another's land, and then have been enjoyed a considerable length of time - Jury will presume an agreement. An injunction may issue to prevent one from building on another's ground. Chan<sup>y</sup> will not however consider as a nuisance for the purpose of issuing an injunction, that which is not at Comm. law a nuisance for the purpose of supporting an action. On this ground an injunction will not issue to prevent one from building a pent house for this is not at Comm. law a nuisance. A writ of injunction will not issue to stay common. Perhaps damages given at law are deemed equivalents yet if they are continued for a length of

2 Dec 174

3. 4th. 750

1 Nov. 29

2 Feb. 139

146

time so as to become a nuisance an injunc- 260  
-tion will issue. That which in its inception  
is a mere trespass may by continuance be-  
-come a nuisance; an action will not lie at  
Law <sup>as</sup> for a nuisance, when it is a mere tres- <sup>3. M. 21</sup>  
-pass. Relief on an unconscionable bargain <sup>6. Com. 52</sup>  
or agreement is effected by injunction and  
when the Equity of the Deft. at law, who is  
Plff in the bill arises out of the answer of the  
Plff at law, who is Deft in the bill an injunc- <sup>2. Chanc. 66</sup>  
-tion will issue to stay the trial. In cases <sup>76</sup>  
<sup>98</sup> <sup>Sac 174.</sup>

where one judgment in a court of law is not  
a bar to another, between the same parties &  
there have been several judgments all in fa-  
-vor of the same party, and suits are still  
brought Chanc<sup>y</sup> will issue an injunction to  
quiet the title of the prosecuting party.

This is the case in actions of Ejectment where  
the nominal Plff, and Deft may be altered  
a thousand times. The names of the parties



1 Bro. P. C. =

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on the record are different, one action is not a bar to another for the same cause.

Bro. C. 268

It was once holden that Chan<sup>y</sup> could not interpose in such case, but the decision was reversed. There are also other cases where an in-

11 Rem. 56.

2 Ch. 282.

4 Bro. 174.

junction may issue to quiet a person in the possession of his estate, as where he has a plain equitable title, and has been in possession for a length of time - as a trustee, who has had the possession for many years. An injunction may issue except in cases of ejectment to prevent a multiplicity of suits respecting the same rights. When many suits are pending or are likely to happen, because an action cannot settle the question. Chan<sup>y</sup> will issue an injunction and thus draw the question within its own jurisdiction, and settle it at once, as where there are several tenants of a manor claiming the profits, so where a multiplicity of suits are about

to arise respecting the boundaries of land. Then I will write all the parties and settle the question at once. And it was <sup>on</sup> a principle analogous to this that the case of Boardman against Lyman was decided in Sup. court Feb<sup>y</sup> 1800, in which the court said that where <sup>there were</sup> more than two partners, an action of account would not lie against one of them as it would tend to a multiplicity of suits. So also an injunction may issue pending a controversy between two or more persons claiming to be Executors of a third. It issues to restrain them from acting as executors until the right is determined. There is no other way to prevent them but by applying to Chancery. An injunction may issue when a person violates the literary property of another. It may issue in favour of authors, or inventors, to restrain others from publishing their works, or imitating their inventions. There has been

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 104  
 127.5  
 100m. 22  
 308  
 266  
 1. 22. 292  
 2. 22. 484

100m. 179  
 1. 22. 193  
 2. 22. 78



a great question, whether at Com. law there is  
an exclusive right to literary property, but  
it has been so decided in the court of Kings-  
Bench, and in the house of Lords. The latter  
decided, six to five, that the common law  
remedy, took not away that by the Stat.  
act. Lord Mansfield was among the five.

I therefore think the weight of authority ag-  
ainst the last decision.

6 Amb. 164

1 Kent. 31

6 Will. 124

1 term. 120

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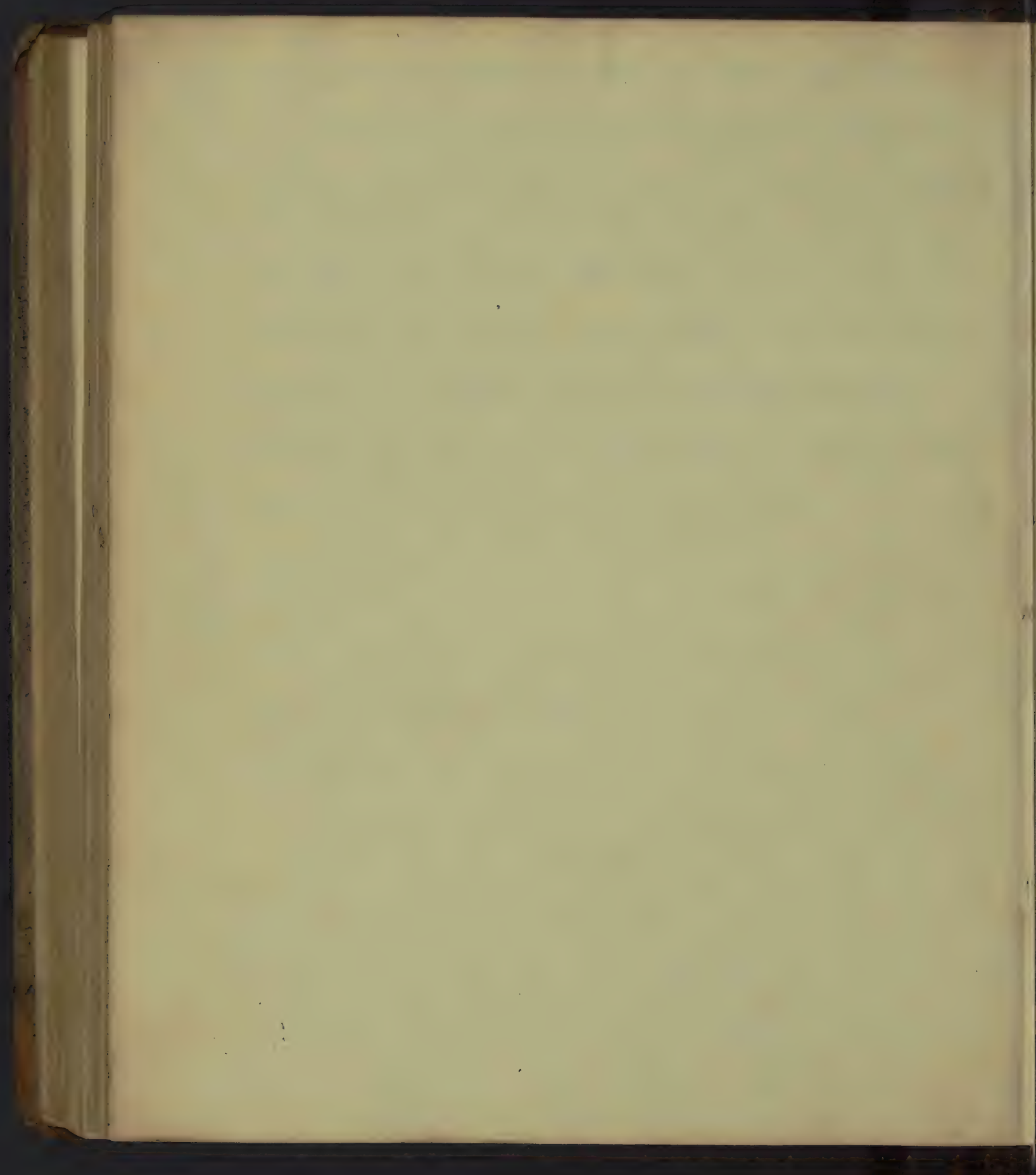
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4 Burr. 2863

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